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# Report - Paying for the Past: Addressing Past Property Violations in South Africa

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Addressing Past Property Violations  
in South Africa



By: Professor Bernadette Atuahene





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# CLAIMANT PROFILES

## Ms. Majola

Ms. Majola is a proud South African woman from the Xhosa ethnic group. As a consequence of the Group Areas Act, the apartheid government evicted Ms. Majola and her family from Amstelhof and relocated them to a house in an African township called Mbekweni that “was not complete, did not have cement, no roof, nothing that showed that it was a home. It was very empty.” Ms. Majola scowled as she remembered “one thing that made me have hatred is because the way we leaved there and our homes were demolished. Whether you like it or not you had to move. We were having no money and our homes were not furnished.”

Soon after the transition to democracy in 1994, Ms. Majola heard that the new government—led by the African National Congress (ANC)—was compensating families like hers who were evicted as a result of racially discriminatory policies. The Commission gave her R 25,000 (approximately \$ 3,571) as compensation for the apartheid state’s confiscation of her deceased father’s house in Amstelhof. She spent the financial award to improve her father’s home in Mbekweni because she thought this was the best way she could honor his memory. She explained that during apartheid her father was an ANC fighter and so he and the rest of her family made serious sacrifices for South Africa’s liberation. “My father was a ANC. We couldn’t go to school because my father was very busy with ANC. My father divorced my mother because of ANC. Did he gain something from the ANC, nothing. Did we go to school, no because our father couldn’t support us. He is in Joburg, Durban, all over the world. The boss of his life was ANC.”

Unfortunately, Ms. Majola’s father did not live to witness the end of apartheid, but the financial award from the Commission allowed her to improve his house so that it could stand as a memorial to him. Ms. Majola said that the money was able to heal “some of the wounds” but then she became momentarily quiet and pensive then added abruptly “but not really.”

## Mr. Rathod

Mr. Rathod is a proud South African of Indian descent. As a result of the Group Areas Act, Mr. Rathod and his family were evicted from Marabastad, a vibrant, mixed-race community in Pretoria’s city center, and relocated to Laudium, a township the apartheid government reserved exclusively for Asians. When they were forced to leave their beloved home, the apartheid government robbed Mr. Rathod’s family of a valuable asset and, more detrimentally, it irreparably ripped apart valuable social ties. Mr. Rathod reminisced about the times before the eviction, “When we were little kids and we used to play together. We really used to enjoy ourselves and we used to eat, like if your mother cooked we all sitting there and in one plate we having our food. We eating out of one plate. It was a beautiful time I really, I thank the, I thank God for letting me live in those years.”

Now, Mr. Rathod complained, life in Laudium is nothing like Marabastad “my neighbors they won’t even tell you good morning.” Although nothing could compensate Mr. Rathod for the lifelong relationships that he lost when the apartheid government evicted him and his family from Marabastad, he lodged a claim for compensation with the Commission. The Commission paid R 80,000 (approximately \$ 11,428) in compensation for the racially motivated confiscation of his father’s property in Marabastad. Mr. Rathod, however, received only R 10,000 (approximately \$ 1,428) after the sum was split between his father’s eight children.

Mr. Rathod could have used the award to complete a minor home improvement, but his house was already renovated. He could have used the award to take classes, but he is retired and no longer interested in improving his human capital. He could have invested the award in his family’s education, but his children are educated, economically stable, and not in need of his monetary contributions. He could have invested the award in a high yield financial instrument, but the return on R 10,000 was not worth the trouble to Mr. Rathod, a successful businessman who owned a driving school and a trucking business at one time. Like many other respondents from the upper-class, Mr. Rathod spent his financial award on non-essentials.

“Man, to tell you the truth professor, I had to buy a TV for my son and I don’t know what I did with the other money. I really, I even forgot.” Then he looked slyly at his wife sitting next to him and suddenly a mischievous smile broke across his face as he confessed to me while still gazing at his wife, “but I think I went to the casino to tell professor the truth.” His guilty admission caused us all to burst into raucous laughter.

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# ABOUT THE AUTHOR



Professor Atuahene earned a JD in 2002 from Yale Law School, a MPA in 2002 from Harvard University, John F. Kennedy School of Government, and a BA (magna cum laude) in 1997, from University of California, Los Angeles.

Professor Atuahene has broad and varied experiences in the fields of law and international development. She has worked as a legal consultant for the World Bank and as a human rights investigator for the Center for Economic and Social Rights, where she received Amnesty International's Patrick Stewart Human Rights Award for her work with human rights organizations throughout South America.

As a Fulbright scholar, Professor Atuahene served as a judicial clerk at the Constitutional Court of South Africa, working for Justices Tholie Madala and Sandile Ngcobo. Following her clerkship, she began practicing as an associate at Cleary, Gottlieb, Steen & Hamilton in New York, where she focused on sovereign debt and real estate transactions.

In 2005, Professor Atuahene joined the

faculty of Chicago-Kent College of Law, where she teaches courses on property; law, policy and international development; and international business transactions. Broadly, Professor Atuahene's research deals with the confiscation and restitution of real property.

In 2007 she was selected to become a Faculty Fellow at the American Bar Foundation, a socio-legal think tank based in Chicago. In 2008 the Council on Foreign Relations awarded her its International Affairs Fellowship, and she worked with Tozi Gwanya—the South African Director General of Land Affairs and his staff to complete this evaluation of the Land Restitution Program.

Professor Atuahene is presently writing a book about the Land Restitution Program, which is based on 150 interviews she conducted with people who were evicted from urban areas during apartheid and consequently received some form of compensation through the program. Professor Atuahene is also directing and producing a documentary film about one South African family's struggle to reclaim the land stolen from them during apartheid.

For more about the film go to: [www.discwebsite.org](http://www.discwebsite.org). Professor Atuahene can be contacted at [atuahene@yahoo.com](mailto:atuahene@yahoo.com)



# EXECUTIVE SUMMARY

The constitution of South Africa mandates equitable redress for individuals and communities who colonial and apartheid era governments took land from after 1913 as a result of racially discriminatory laws and practices. However, the constitution also allows current owners to maintain possession of their land regardless of the manner in which this land was obtained. In order to accommodate both of these sometimes conflicting constitutional mandates, the Land Restitution Commission (the Commission) has provided equitable redress for dispossessed populations either by giving them financial compensation or purchasing land for them from current owners.

## Did Financial Compensation Contribute to Economic Development?: The Commission's Top-Down Perspective

The function of equitable redress is not only to compensate past victims for financial losses, but also to economically empower South Africa's black majority. The Commission's pervasive, institution-wide assumption is that recipients wasted the financial awards because the money is gone and they are still in poverty. Consequently, in recent years, the Commission has shifted its policies away from its former emphasis on financial compensation as a means of granting equitable redress and toward a strong emphasis on land restitution.

## Did Financial Compensation Contribute to Economic Development?: Beneficiaries' Bottom-Up Perspective

In contrast to the Commission's assumption that financial compensation did not result in economic empowerment and its consequent policy shift, the interviews I conducted with financial award recipients show that in 30 percent of the cases the award did produce a substantial

economic benefit. The majority of these people spent their financial award on improving their current home and thus increasing the value of their primary asset.

The evidence showed that financial compensation did not have an enduring economic impact when recipients:

- received small awards or awards that constituted only small percentages of their overall net worth;
- were more interested in making cultural rather than economic investments;
- were older and had a self interest in experiencing the benefits of the financial award while they were still alive rather than spending their awards in ways that would produce a long-term economic impact that would primarily benefit others; or
- had several economically dependent family members.

## Policy Recommendations

Since the empirical evidence shows that financial compensation did produce a long-term economic benefit under certain circumstances, the Commission must reconsider its policy of de-emphasizing the financial compensation option and instead adopt policies that improve this option by:

### Increasing the impact of smaller financial awards

- Allow claimants to choose between various forms of equitable redress, while providing incentives for claimants to select options that will produce a long-term economic benefit.
- Provide financial counseling to claimants who elect to receive financial compensation.

### Increasing the amount of financial awards

- Increase the amount of financial awards by treating beneficial occupants on par with dispossessed owners.
- Pay current owners just compensation rather than the more costly market value of their property when purchasing land for dispossessed populations and use the savings to increase the amount of financial awards.

# CONSTITUTIONAL RIGHT TO EQUITABLE REDRESS

The constitution of South Africa affords equitable redress to individuals and communities dispossessed of their land after 1913 as a result of racially discriminatory laws or practices. Those dispossessed are entitled to compensation by way of financial award or land restitution. This study analyzes only the financial awards the Commission gave to people evicted from urban areas.

In order to promote social reconstruction, transitional states often must deal with past injustice. One particularly difficult issue frequently facing these states is what to do when former regimes have unjustly confiscated property from one group and given it to another. The most common response is to do nothing. But South Africa, Kosovo, Romania, the Baltic Republics, El Salvador, Colombia, Germany, Guatemala, Hungary, Slovakia, and the Czech Republic are among the few nations that have compensated their citizens for property violations that occurred under prior regimes.<sup>1</sup> South Africa, however, stands head and shoulders above other nations because its citizens have a unique constitutional right to restitution

for past property violations.<sup>2</sup>

During South Africa's colonial and apartheid eras, the white minority usurped property from millions of nonwhites without paying just compensation.<sup>3</sup> In the political transition from apartheid to democracy, the incoming political administration—led by the African National Congress (ANC)—entered into a bargain with the outgoing apartheid government that dictated what the new democratic state could do to correct past land theft. The ANC conceded to the apartheid government's demand to constitutionally protect existing property rights regardless of how the owners had acquired their property.<sup>4</sup> This meant that even if, for example, the apartheid government had





confiscated land from a black community and transferred it at nominal cost to a white farmer; if the farmer still owned the land at the end of the apartheid regime, under section 25(1) of the constitution, his rights to that land were secure.

In exchange for this ample concession, the ANC ensured that individuals and communities dispossessed of their land under white minority rule were afforded certain constitutional remedies as well. Section 25(7) of the South African Constitution states that a “person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.”<sup>5</sup> Section 25 does not provide a remedy for the vast majority of unjust land confiscations that took place prior to 1913 under colonialism; instead, the liberation bargain only ensures a remedy for property violations that occurred

after 1913, the year that the South African state (formed in 1910) first used its legislative powers to dispossess Africans through the Native Land Act.<sup>6</sup>

The Restitution of Land Rights Act of 1994 (the Act) is the parliamentary act that gives Section 25(7) life. The Act charges the Land Claims Commission (the Commission) with implementing South Africa’s restitution program.<sup>7</sup> As of March 31, 2008, the Commission had rejected or authorized compensation for (that is, “settled”) 95 percent of the 74,747 claims lodged by dispossessed individuals and communities—a laudable achievement by any measure.<sup>8</sup> The Commission settled claims primarily by providing financial awards or restitution of land to people evicted from both urban and rural areas. This study, however, focuses exclusively on the 47,726 claims in which the Commission gave financial awards to people evicted from urban areas.<sup>9</sup>

*A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*

While, under the provisions of the Act, 1913 is the key year for determining eligibility for restitution, the majority of urban evictions happened under the Group Areas Act of 1950, which was intended to accelerate the policy of separate development by removing Africans, Asians, and Coloureds from urban areas demarcated for white occupancy.<sup>10</sup> According to the best estimates available, between 1960 and 1983 the apartheid government removed approximately 3.5 million people from metropolitan areas to either the cities' peripheries or to remote, rural homelands.<sup>11</sup> Vibrant communities were dismantled, tight-knit families were separated, and valuable property was lost.

*According to the best estimates available, between 1960 and 1983 the apartheid government removed approximately 3.5 million people from metropolitan areas to either the cities' peripheries or to remote, rural homelands*

One such community destroyed by the Group Areas Act was Marabastad, a bustling, mixed-raced neighborhood in Pretoria's city center. Mrs. Green is the alias I have given to a Coloured woman and former resident of Marabastad who owned a lovely eleven-room house

there with her husband.<sup>12</sup> She reminisced with affection: "the people of Marabastad, we were like a family. We knew each other." Throughout the 1950s, the apartheid government destroyed these valuable social bonds by evicting Marabastad's residents and relocating them to various townships far from the city center. Africans were essentially dumped in Atteridgeville, Coloureds in Eersterust, and Asians in Laudium. Mrs. Green's home was expropriated without just compensation, and her family was forced to relocate to Eersterust. She is now a senior citizen but still vividly remembers the bitter day that she was essentially discarded:

My second baby Al was two weeks old. Two weeks, and they just come. They never gave us letters to say we must move to this place. They just come, said, "You must out, now, furniture and everything," and just put it on the truck and said, "You going to this place." ... They lock my husband up. I ... I really do ... don't know for what. Ja. My husband was locked up. They couldn't tell me why, and they come after three weeks and told me, "Here's the lorry." They just put the baby's cot first. I said, "But my baby, the milk, and everything." They said, "No, no, no, no, no. Just come." "Where are we going?" "No, you'll see ... You'll see for yourself."<sup>13</sup>

Mrs. Green's husband was never released and died in jail about eight years after this

harrowing experience. The Commission paid Mrs. Green R 60,000 (approximately \$ 8,571) to satisfy its constitutional obligation to provide equitable redress for the property that the apartheid government stole from her family.<sup>14</sup>

There was a crippling and enduring economic effect when former governments confiscated property from Mrs. Green and others like her. Wealth is an intergenerational phenomenon: it is accumulated during a person's lifetime and then passed along to kin.<sup>15</sup> Likewise, disadvantage is also accumulated over generations such that the devastating tremors from the initial theft of assets—like the theft of Mrs. Green's house—reverberate through time.<sup>16</sup> In South Africa, Africans and Coloureds presently occupy the lowest rungs on the economic ladder, due in part to the fact that they have not recovered from the catastrophic depletion of their assets during colonialism and apartheid. Whites, on the other hand, are

economically dominant, in part because they directly or indirectly benefited from past theft perpetrated by colonial and apartheid-era governments.

*In South Africa, Africans and Coloureds presently occupy the lowest rungs on the economic ladder, due in part to the fact that they have not recovered from the catastrophic depletion of their assets during colonialism and apartheid*

The Commission is a key player in South Africa's reconciliation process, and its job is not just to determine and distribute equitable redress but also to ensure the awards contribute toward the larger societal goal of social reconstruction. One important way that the Commission can work toward this goal is by ensuring that these financial awards have a long-term economic impact so that past theft no longer debilitates future generations.



# RESEARCH QUESTION

Did the financial awards that the Commission gave to people evicted from urban areas increase their net assets or were the awards consumed with no appreciable effect on the long-term economic well-being of award recipients?

According to the Act, the vision is “to be leaders in the restitution of land rights to victims of racial land dispossession in a manner that ensures sustainable socio-economic development.”<sup>17</sup> As of March 31, 2008, the Commission had spent R 4.9 billion (approximately \$ 700 million) on financial awards.<sup>18</sup> It is important to understand how individuals spent the money in order to assess whether the awards had an enduring economic impact and contributed to sustainable socio-economic development.

Using data from eighty semi-structured interviews, this study will explore whether (a) the financial compensation the South African government gave to Mrs. Green and other people similarly evicted from urban areas has increased their net assets; or (b) the compensation was consumed and has had no appreciable effect on their long-term economic well-being.

In this study, the terms *enduring* and *long-term economic impact* are synonymous with an appreciable increase in net assets.

Although the focus of this study is the economic effect of compensation, I embrace the fact that this is not the only (or, necessarily, the most important) lens through which to view the restitution program’s outcomes. In future works, I will evaluate the program’s outcomes from other perspectives.<sup>19</sup> Without insinuating that there is one right way to spend a financial award,<sup>20</sup> I will explore whether the awards had a long-term economic benefit for recipients.

# PRIOR STUDIES

The existing research suggests that individuals are more likely to save rather than consume a large financial award, as compared to a small award; however, the current literature has yet to examine the reason behind this pattern of behavior.

Economists have developed a substantial literature examining consumption patterns among the poor. There are, for instance, studies about how the poor in the United States spend windfall (or unexpected) income such as the Earned Income Tax Credit, which consists of one large payment per year.<sup>21</sup> These studies find that most expenditure goes toward durable goods, especially vehicle purchases and transportation spending.<sup>22</sup> In addition to the literature about the spending patterns of indigent populations, economists have developed consumption theory, which predicts how people, regardless of their income or class, will spend windfall income such as the financial awards distributed by the Commission. Milton Freidman, the progenitor of this literature, suggests in his permanent income hypothesis that the marginal propensity to consume windfall income is considerably smaller than the mar-

ginal propensity to consume out of permanent income.<sup>23</sup> That is, people are more likely to save windfall income (like financial awards) than permanent income.

*People were more likely to save rather than consume larger financial awards.*

Kreinin, in his empirical study using data from eighty-one Israelis affected by the Holocaust who, like the respondents in this study, received financial awards, found considerable support for Freidman's hypothesis.<sup>24</sup> Landsberger refined Kreinin's study by investigating the effect of the windfall payment's size.<sup>25</sup> When he separated 297 Israelis who received financial compensation from the German government into five groups, Landsberger found that the marginal propensity to consume decreased as the size of the windfall payment increased,

validating Friedman's hypothesis.<sup>26</sup> That is, people were more likely to save rather than consume larger financial awards.<sup>27</sup> If Landsberger's work holds in the context of payments made through the South African Land Restitution Program, then my data should show that larger financial awards result in an increase in net assets while smaller awards are consumed, with no long-term impact.

Since the literature has been dominated by economists, studies examining consump-

tion patterns have been primarily quantitative. Thus, while the studies were able to determine the marginal propensity to consume windfall income with a high level of statistical certainty, they could not offer deep insights into *why* people fell into those particular spending patterns. To evaluate whether the Commission achieved the Act's objective of promoting sustainable socioeconomic development, this qualitative study employs a socio-legal analysis that uses in-depth interviews to analyze consumption patterns.



# METHODOLOGY

The study is based on twenty-five in-depth interviews with Commission officials and eighty in-depth interviews with claimants who received financial awards from the Gauteng and Western Cape Regional Land Claims Commissions.

## Method for collecting the data

From February to August of 2008, I conducted twenty-five semi-structured interviews of Commission officials, which lasted between thirty to ninety minutes each, were audio taped, transcribed and were not completely confidential. I also completed 141 semi-structured interviews of urban claimants that also lasted between thirty to ninety minutes, were audio taped and transcribed with the promise of confidentiality (pseudonyms mask the respondents' identities).<sup>28</sup> Since the research question I address here is whether the financial compensation distributed by the Commission has increased recipients' net assets, the sample I use in this study is limited to eighty of the 141 interviews in which the respondents received financial compensation as opposed to restitution of land.

Before conducting any interviews, I obtained human subjects approval from my university. To select interview candidates, I relied heavily upon the Commission's financial data lists, which are organized by community, contain the names of all beneficiaries who received financial compensation, and list the amounts that they received. I first selected a community based on certain variables of interest such as race, award size, pre-eviction occupancy status, award options, and effectiveness of community leaders. I then randomly selected claimants in that community from the financial data list. For about three-quarters of the claimants randomly selected, I was able to find a working phone number from the Commission's records department; and over 90 percent of the people I was able to reach agreed to be interviewed.<sup>29</sup> I conducted 80 percent of these interviews entirely in English. In those instances when the

respondent was not comfortable speaking in English, I used a translator. I conducted the vast majority of the interviews in the respondents' homes so that I could verify certain facts such as whether respondents used the compensation to renovate their homes.

Although multiple family members were entitled to compensation, I found that the Commission generally communicated with (and had contact information for) only one family member known as the claimant. Therefore, the downside of relying on the Commission's records was that active claimants—who were constantly interacting with the Commission—accounted for about 81 percent of all respondents interviewed. Consequently, my data have a particular bias because these claimants were likely to have different opinions and experiences than those family members who played more passive roles. I tried to mitigate this bias by asking primary claimants to put me in touch with other family members who had not played significant roles in the claims process, but I was successful in fewer than five instances.

Although locating respondents primarily using the Commission's financial data lists and records was not perfect, it was superior to the alternative—the snowballing method—in which referrals from initial respondents generate addi-

tional respondents. Snowballing can introduce a more severe bias because the resulting data may reflect the views of a limited network of acquaintances; thus it is best to use snowballing for people who are difficult to identify. Consequently, I relied on snowballing to identify less than one-quarter of my sample, most of whom were community leaders whom I was unlikely to randomly choose using the financial data list but who had a wealth of information that was extremely valuable to this study.

The methods I employed have certain limitations. First, I did not collect data on the ethnicity of Africans and so cannot discuss the ways in which ethnicity informed how respondents spent their financial awards. Second, the data are not generalizable to the entire population because 47,726 urban claimants received financial awards, but I interviewed only eighty; and while I did randomly select respondents in each community, I did not randomly select the communities. Consequently, my findings are best suited to generating theory.

## Description of the sample

Table 1

Region	Gauteng	Western Cape		
	36	44		
Gender	Female	Male	Mixed Gender Interview	
	39	39	2	
Race	African	Coloured	Indian	White
	30	39	5	6
Level of involvement	Active Claimant	Community Leader	Passive Claimant	Unassigned
	55	10	13	2
Age	60 and under	61-75	76 and above	
	21	47	12	
Relation to ODI (Originally Dispossessed Individual)	ODI	Child	Grandchild	
	11	55	14	
Employment	Working	Unemployed	Unemployed Pensioner	Unkown
	25	5	49	1
Owner or tenant at time of eviction	Owner	Tenant		
	35	45		

Since this study exclusively addresses urban claimants, I limited the sample to claims originating in South Africa's two principal urban centers—Gauteng and Western Cape (see Table 1).<sup>30</sup> 45 percent of respondents were from Gauteng, while 55 percent were from the Western Cape.

As seen in Table 2, one main difference between the two provinces is that Gauteng systematically paid higher financial awards than

the Western Cape; in all regional offices, except Gauteng, the Commission gave dispossessed tenants lower financial awards than the awards given to dispossessed owners on the principle that ownership rights were more valuable than tenancy rights. In Gauteng the early regional land claims commissioner, Blessing Mphela, made an executive decision to pay both groups equally; hence the average payout in Gauteng was consistently higher.<sup>31</sup>

Table 2

Community name	Median Individual Payout	Median Award for Family Claim
Western Cape		
White	200,000	360,000
District Six	18,000	38,00
Paarl	25,580	25,580
Luytlo	11,250	22,500
Mossel Bay	12,852	45,600
Steurhof	14,280	35,400
Die Eiland	11,429	17,500
Dysseldorp	4,893	29,500
Other	3,166	40,000
Gauteng		
Kliptown	50,000	102,020
Evaton	35,910	142,450
Kilnerton	28,335	113,343
Sophiatown	28,000	70,000
Marabastad	46,666	60,000

This study separates claimants into three employment categories—working (31 percent), unemployed pensioners (61 percent), and unemployed (6 percent). The *working* category includes people who were working both part- and full-time regardless of age. The *unemployed pensioners* category includes respondents aged sixty or older whose primary sources of income were their old-age pensions. The *unemployed* segment covers respondents under sixty who were not working. Only 26 percent of the sample was under sixty at the time of the study,

and most of those people were working.<sup>32</sup> The vast majority of respondents (74 percent) were sixty or older and thus eligible for old-age pensions.<sup>33</sup> Most urban evictions were executed under the authority of the Group Areas Act of 1960; so many of the Originally Dispossessed Individuals (ODIs) were deceased, and their children (who were pensioners by the time of the study) were receiving compensation in their place. While 14 percent of respondents in this study were ODIs,<sup>34</sup> 69 percent were their children, and 18 percent were their grandchildren. The sample was balanced along gender lines (50 percent women and 50 percent men) and, in terms of race, included Africans (38 percent), Coloureds (49 percent), Indians (6 percent), and whites (8 percent).<sup>35</sup> The majority of African claims originated from Gauteng, while the Coloured claims were principally from the Western Cape. The few whites in the sample all hailed from the Western Cape and were mostly working people under sixty.<sup>36</sup> All the Indians in the sample were from a community in Gauteng called Marabastad; they were primarily male due to cultural norms of inheritance.<sup>37</sup>

Determining each respondent's class status was a challenge since data on annual salaries were not available. However, since I conducted



the vast majority of interviews in respondents' homes, I was able to observe their surroundings and possessions. I supplemented these observations with information that was revealed during the interview to assign each respondent a class status. I classified a person as poor if it appeared they were struggling to pay for the basic

necessities of life such as food and shelter. I classified them as *working poor* if they owned a home and either someone in the household was working or the necessities of life were covered through some other source of income. I applied the term *middle class* if they owned a home, the basic necessities of living were covered, and the respondents enjoyed some amenities such as nice furniture. I reserved the *upper class* tag for respondents who owned either homes that were far superior to others in the townships or modest homes in more expensive neighborhoods, and enjoyed amenities such as cars. In the sample, a statistically significant correlation existed between being poor and being a woman or an African.



# DID FINANCIAL COMPENSATION CONTRIBUTE TO ECONOMIC DEVELOPMENT? THE COMMISSION'S TOP-DOWN PERSPECTIVE

Interviews show that Commission officials believe that financial compensation did not have an enduring economic impact on recipients because after the awards were spent, they were still in the same economic position.

## The Commission's process for distributing financial compensation

The dominant view among Commission officials is that financial compensation has not had a long-term economic benefit for claimants. In order to understand the issue fully, however, one must have a basic knowledge of how the land restitution process has unfolded. In the first of five phases, an individual or community had to lodge a claim by December 31, 1998, in order to become eligible for compensation; these people were called claimants. In the second phase, the Commission determined if the claims were valid by researching whether the claims met certain statutory requirements.

Each claim had to involve (1) a person, community, or a deceased estate or direct descendant of a person or a community (2) dispossessed of a right in land (3) after June 19, 1913 (4) as a result of past racially discriminatory laws or practices (5) without the receipt of just and equitable compensation.<sup>38</sup>

Once the Commission determined that a claim fulfilled these statutory requirements, the Commission verified in the third phase that the claimant was either the prior owner or occupant of the property in question or the descendant of the prior owner or occupant. The Commission accepted various forms of evidence to validate and verify claims, including deeds, oral testimony, aerial maps, ruins,

tombstones, and baptismal records.

During the fourth phase, called the negotiation phase, the Commission was supposed to give claimants a choice between financial compensation, land restitution, or some other equitable remedy. The White Paper on Land Policy, the government's definitive policy on land matters, states that choice is to be central to the restitution process: "solutions must not be forced on people."<sup>39</sup> But, in truth, almost no one had the opportunity to craft his or her own equitable remedy because giving claimants choice and allowing them to craft their own remedies would have involved taking time to consult with claimants and devise workable arrays of options.<sup>40</sup> The Commission had no such time; it had resolved very few claims from 1995 to 1999 and so from 2000 to 2008 was under extreme pressure to settle claims rapidly.<sup>41</sup>

Due to time pressures, the Commission not only failed to allow claimants to craft their own equitable remedies, but it also heavily encouraged claimants to accept financial compensation because this allowed it to settle claims more rapidly. The alternative—land restitution—involves an expensive and lengthy process requiring the government to identify suitable land, purchase it, transfer it to claimants,

and provide various forms of post-settlement support. The Commission initially encouraged claimants to choose financial compensation because it was easier and quicker.

During the fifth and final (valuation) phase, the Commission determined the amount of financial compensation it paid claimants. The Commission paid most claimants using a Standard Settlement Offer (SSO) that did not reflect the current market value of the properties in question or the properties' market value at the time of the evictions. The SSO ranged from R 17,000 to R 60,000 (approximately \$ 2,428 to \$ 8,571) depending upon the SSO amount adopted by each Regional Land Claims Commission, which changed over time. In most regions there were different SSO amounts for tenants and owners. The SSOs for tenancy rights started at R 17,000, an amount based on the cost of serviced sites in the areas the state dispossessed the claimants from or the value of the housing grants. This amount increased on an annual basis as the housing subsidy increased. To determine the SSO for owners, each regional office calculated the average municipal value for owners in a sample of areas in that region. In both Gauteng and the Western Cape the SSO started at R 40,000 (approximately \$ 5,714) and eventually increased to R 60,000.

In 2003, the Minister of Land Affairs approved the sliding scale, which allowed the Commission to give increased compensation to dispossessed owners whose land was in excess of six hundred square meters.<sup>42</sup>

## The Commission's perspective on financial compensation

*One Commission official estimated that only “one out of ten make something out of the compensation*

By 2007 the Commission settled most of its urban claims and completely switched its focus away from providing financial compensation to fervently encouraging communities and individuals to choose land restitution. For varying reasons, most officials regret initially giving claimants the option to receive financial compensation in the negotiation phase. In interviews, some officials indicated it was a bad idea because they believed people wasted the money. One Commission official estimated that only “one out of ten make something out of the compensation.”<sup>43</sup> Some officials insisted that claimants spent the money on frivolous,

counterproductive expenditures. An official in the Western Cape RLCC was convinced that “financial compensation is not having an effect. We will assist with payment in the morning, and in the evening everyone is in the bottle store. They don’t know what to do with the money.”<sup>44</sup> Another official shared a similar sentiment, he felt that “cash is spent over a weekend, and then they have no cash and no land.”<sup>45</sup>

*“Financial compensation is not having an effect. We will assist with payment in the morning, and in the evening everyone is in the bottle store. They don’t know what to do with the money.”*

A different, more compassionate view expressed by officials in the Commission was that people spent the financial award on daily survival rather than on alcohol or weekend revelry. Tozi Gwanya, the Director General of Land Affairs, succinctly articulated this view when he stated that

**the [Land Restitution] Act should not have given the option of financial compensation because the money is consumed and there is no long-term effect. We could have done without financial compensation if there were other options, creative options that could have a transformative impact; but proper thought was not put into it. If we were given another opportu-**



nity, things would be different, but it is now too late in the afternoon. Now we are just left with the rural claims, and these will be land restoration. We wrongfully assumed that people are mature and can make their own decisions, which is usually a good assumption. But, once you factor in poverty there is no rational thinking; when you are poor what you eat next informs you.<sup>46</sup>

Mr. Gwanya's comments are informed by the fact that land restitution is more economically advantageous than financial compensation for this reason: While many individuals and communities lost grazing or usufruct rights to barren land, through the restitution program, they received full ownership rights to land with improvements. In contrast, claimants who chose financial compensation only received paltry financial awards that were often far below the historic or current value of the property rights that were unjustly extinguished by the apartheid and colonial-era governments.

As a result, one Commission official emphasized, "I am not encouraging them to opt for financial compensation because, if removed as tenant, they get paid R 40,000. If they were an owner, then they get R 40,000 plus the sliding scale. It is under compensation only when cash is involved; but with development they get more because many lost barren land, and now they are assisted in getting a top structure."<sup>47</sup>

The commissioner of the Western Cape RLCC, Beverly Jansen, agreed that those who chose financial compensation were undercompensated because "we cannot afford to pay current market price for ownership, so we have the SSO, which is not market related. If we could do it again, then there would be no cash compensation or only in rare cases."<sup>48</sup>

*"If we could do it again, then there would be no cash compensation or only in rare cases."*

Part of the conundrum for Commission officials was why people chose financial compensation when it was not the most economically beneficial choice. William Nero, Deputy Director of the Western Cape Regional Land Claims Commission, concluded that "a lot took financial compensation, and I am disappointed.

It makes me sad because it will not change their life, and it is not sustainable. It does not make sense. I ask myself why, and I think people are settled where they are, or people are so poor they see this as a temporary relief because poverty is endemic in the Cape Flats.”<sup>49</sup>

Some Commission officials believed that financial compensation was detrimental not only because people were undercompensated but also because it undermined the larger land reform project. At the end of apartheid, 87 percent of the arable land was owned by whites, who constituted less than 10 percent of the population.<sup>50</sup> Consequently, land reform was imperative. In 1994 the new political dispensation, advised by the World Bank, aimed to redistribute 30 percent of the country's agricultural land in five years; but less than 1 percent was redistributed by 1999, less than 3 percent by 2003, and less than 5 percent by 2008.<sup>51</sup> Land redistribution, land restitution, and tenure upgrading are the three central prongs of the national land reform strategy, and land restitution accounted for 1.5 percent of the 5 percent that had been redistributed as of 2008.<sup>52</sup> But, without the financial compensation option, the Commission could have contributed far more than 1.5 percent to the national goal.

Peter Piccolo, a Commission official,



insisted that “land reform’s purpose is to restore lost land rights or reallocate land to those who were formerly disqualified. Land reform is not the success all hoped it would be because financial compensation is a valid and legal option. If this choice was not given, then we may have seen other outcomes.”<sup>53</sup> Angela Conway, the executive director of a land-based NGO, Southern Cape Land Committee (SCLC), emphatically agreed saying “I think cash compensation is horrible. It will not transform levels of poverty and land ownership. Claimants are elderly, and it [the evictions] happened long ago, and they are too old to move back. [The financial compensation] gets you out of debt, and it can buy a secondhand television or car, but it does not address skewed land ownership patterns.”<sup>54</sup>

While different reasons were given for why financial compensation was a bad option,



the resounding conclusion among Commission officials was that the financial awards did not have an economically sustainable benefit for claimants. The data I collected confirm that some claimants did spend their financial awards such that they experienced no increase in their net assets, but significant evidence also indicates that people spent the money such that they have experienced sustainable economic benefits. Commission officials assumed that compensation had no long-term effect if beneficiaries spent their financial award, but officials failed to consider *how* that money was spent.

For instance, Commissioner Mphela put it this way: “They spend it. Once the money is in hand, then poor people cannot postpone consumption. They spend it on tombstones, additions to their house, and school fees.”<sup>55</sup> Commissioner Jansen also remarked, “I know many people are poor and the needs were so great that the money was used up in the first three months. It was for food and clothing, adding on a room in the house, or buying a bed. Financial

compensation cannot have a long-term effect on people’s lives, but where they have development [land restitution], the effect can be generational.”<sup>56</sup>

But what Mr. Mphela, Mrs. Jansen, and other Commission officials do not fully acknowledge is that the key factor is not whether the money is gone, *but how it was used*. For example, when people use their financial compensation to extend their homes or undergo significant home renovations, this increases the value of a primary asset, which they can pass on to future generations. There is also a long-term economic benefit when a person uses the money to purchase an asset that can generate capital such as a taxi, a high-yield investment instrument, or tertiary education. These investments have the potential to benefit future generations just as the restitution of land does.

In the next section, I will move beyond the assumptions of Commission officials and use the interview data to explore whether financial compensation led to long-term economic benefits.

# DID FINANCIAL COMPENSATION CONTRIBUTE TO ECONOMIC DEVELOPMENT? CLAIMANTS' BOTTOM-UP PERSPECTIVE

Contrary to the Commission's perspective, interviews with recipients of financial awards indicate that for 30 percent of respondents the award had a long-term economic benefit.

Using qualitative data analysis software, I coded each interview transcript and marked respondents' explanations of what they purchased with their financial awards. If a respondent used the compensation such that it would increase his or her net assets and have a long-term economic effect, then I labeled this a *substantial economic impact*. This includes instances when people used their compensation to undertake major home renovations—such as purchasing new roofs or ceilings, extending homes, or plastering their houses—that were likely to increase the value of their homes. It also includes instances in which people used the money to secure tertiary education or purchase income-generating assets like taxis. About 30 percent of respondents experienced a substantial economic impact as a result of the financial awards

they received from the Commission.

When respondents purchased depreciating assets, paid for improvements to their homes that would not necessarily increase their value, paid off debt, or kept the money in low-interest-bearing accounts, this qualified as a *moderate economic impact*. About 33 percent of respondents experienced a moderate economic impact. The data are limited so for respondents in this category it is possible that the financial award resulted in a long-term economic benefit, but it is also possible that it did not. For example, most people did not report what type of debt they paid off, so it is possible that this debt was acquired to make value-increasing home improvements or to purchase depreciating assets, such as cell phones, which allowed these claimants to search for or secure

employment more effectively. It is also possible that respondents used the restitution money to pay off debt and as a consequence later had money available to complete value-increasing home improvements. The data's limitations make it difficult to determine whether the financial awards given to respondents in the moderate economic impact category led to increases in net assets.

When respondents spent their money on things that would not have a lasting economic impact, I labeled this a *low economic impact*. This category includes, for example, expenditures on food and other necessities of daily living, luxury goods, travel, and cultural investments such as tombstones. Although one dominant view among Commission officials was that financial compensation had absolutely no sustained economic effect for the overwhelming majority of claimants, surprisingly only about 30 percent of the respondents fell into this category.

Studies that explore consumption theory have found that larger financial awards are likely to increase recipients' net assets while smaller awards are likely to be consumed with no long-term economic benefit.<sup>57</sup> This study's findings are consistent with this observation. Table 4 shows that the average amount received by respondents in the substantial economic impact category was significantly higher than the average for the moderate economic impact category, which was in turn higher than the average for the low economic impact category.<sup>58</sup>

Also, the data show a statistically significant positive correlation between the size of the award and an increase in net assets. The more interesting story that prior studies exploring consumption theory do not develop is *how* and *why* larger financial awards lead to an increase in recipients' net assets. To explore this, I will contrast respondents whose financial awards had a substantial economic impact with those whose awards had a low economic impact because the differences are most clear at the extremes.

Table 4

	Frequency	Percent	Median restitution award	Mean restitution award
Substantial Impact	24	30%	28,335	127,274
Moderate Impact	26	33%	20,000	48,761
Low Impact	30	38%	15,000	23,399
Total	80	100	22,669*	66,478

# I. Financial compensation had a substantial economic impact

When financial awards had a substantial economic impact, it was primarily because the awards were large enough to allow recipients to complete home remodeling projects. Smaller financial awards increased net assets when respondents: (1) had the financial wherewithal to combine the awards with their own money, (2) completed only minor renovations, or (3) completed substantial renovations in a piecemeal fashion over longer spans of time.

## The general trend

A financial award could have a substantial economic impact in several ways including: increasing the value of an existing asset (for example, by completing a home improvement project); increasing an individual's human capital and thus her capacity to earn money in the future (through job training courses, tertiary education, or the like); allowing for investment in a long-term, high-yield savings instrument (such as a three-year certificate of deposit); or funding investment in a small business (such as a street-side vending enterprise). Despite the array of available options, almost all of the respondents whose financial compensation had a substantial economic impact spent the money on renovating their homes, thereby increasing the value of their primary assets.<sup>59</sup>

A representative story was that of Mrs. Moore, who received about R 25,000 (approximately \$ 3,571) from the Commission. She proudly reported that “we improved the house; made ourselves more comfortable. We built a carport, so on, you know. We did the bathroom, the toilet, made it more attractive so that when we sold that house we got a very good price to what we bought that house for.”<sup>60</sup> Respondents made a wide range of improvements to their homes, but most commonly they purchased new roofs, extended their homes, installed new ceilings, added

security features, or plastered the walls.

The amount of compensation people received affected the scale of their renovations and hence the monetary value they added to their homes. People who received smaller sums were only able to make modest renovations that in turn only modestly increased the value of their homes. The experience of Mrs. Majola—a pensioner who was evicted from Paarl, a mixed-raced community in the Western Cape—was representative. She said, “[T]hat R 25,000 I spent it trying to extend my father’s house. But that house is not complete. It’s because the money is too small. I do say I was happy to get R 25,000 because my father’s house is rebuilt because we had now three rooms there. And they were not done, these houses. It was only three rooms, but if you can go there now, you’ll find it’s a little bigger. It’s still going up to a great house, but I haven’t got any more wings to fly.”<sup>61</sup>

In contrast, respondents who received larger sums, and thus had the resources “to fly”, were able to remodel their homes and substantially increase the homes’ value. Mr. Jones completed significant renovations with the R 48,000 (approximately \$ 6,857) award he received from the Commission for a large property that his father had owned in a community called



Steurhof. “I renovated my front here, made a little sunroom you know. And then I built on a workroom for my wife. She does cake decorating and things like that. So it’s a little workroom for her, and then I enclosed the back stoop.”<sup>62</sup>

A brother and sister who each received R 28,000 (approximately \$ 3,500) for the home their family was evicted from in Kilnerton combined their financial awards to significantly remodel the home they both live in as well as their grandmother’s home.

**Brother:** Just it [the renovation] had enlightened everything. The house looked gloomy. It looked like an old house. So after renovation it looks bright.

**Sister:** And of course up till today everyone says “Oh! This house is good” not knowing just this is [laughing] a facelift. <sup>63</sup>

Mrs. Mpho, a pensioner who lives in Soweto, received R 142,450 (approximately \$ 20,350) for a large piece of land her father owned in a community called Evaton. With this relatively



large sum she was able to make substantial renovations that brought immediate profit. “I used the money to improve the house, pay rent, and buy food. I’m alright now. I fixed the house outside and built three rooms outside that I am renting. I am in the house and eat well. I buy bread and food until my death approaches. It was hard before I got the compensation, but now as long as I have milk and pap, I am okay.”<sup>64</sup>

The evidence is consistent; people in the substantial economic impact category spent their financial awards primarily on home improvements. But, the more interesting question is why they made this choice. For many people, the economic benefit of renovating their homes was not what motivated them to do it. Instead, the home improvements served as a memorial to their parents and other family members who were devastated by the evictions but did not live long enough to receive compensation from the post-apartheid government. Mr. Kagiso, a young, passionate man, was only two years old when his family was brutally evicted from Simonstown, a seaside community of Africans in the Western Cape. He said, “I did nothing for myself. Nothing at all for myself. I didn’t even buy a car for myself. You see, I was just trying, according to my pride, I was just trying to change the shape of my mother’s house.”<sup>65</sup>

Mrs. Reed, like Mr. Kagiso and many other respondents in the substantial economic impact category, was determined to use the money in a way that honored her family: “I thought of my grandparents, and my father was also hard working. And he, each time three o’clock he must get up, me and my other sister then go to the market selling greens. He was hardworking, and my grandfather also. So I say I can’t go roam with this money. I can’t go buy material things for the house or something like a couch. I needed something like a business.”<sup>66</sup> Mrs. Reed used her financial award to make home improvements and purchase a taxi because she wanted to memorialize her father and grandfather who lost so much but did not live long enough to experience the sweet taste of justice.

*“I thought of my grandparents, and my father was also hard working. And he, each time three o’clock he must get up, me and my other sister then go to the market selling greens. He was hardworking, and my grandfather also. So I say I can’t go roam with this money. I can’t go buy material things for the house or something like a couch. I needed something like a business.”*

## Exceptions to the general trend

Although the general pattern is that larger awards lead to an increase in net assets, there are a few cases in my sample in which small financial awards led to increases in net assets. More specifically, only 16 percent of the people who received awards amounting to less than R 20,000 (approximately \$ 2,857) experienced a substantial economic impact, but we can learn from these anomalous cases. Mr. Wilson and Mr. Farley, for example, received small financial awards of R 2,000 (approximately \$ 285) and R 3,000 (approximately \$ 428), respectively. They both used the money to upgrade their homes and increase their net assets.<sup>67</sup> One is a school principal and the other is a successful businessman, so they both had the financial resources to supplement their financial awards to complete their home improvements. Mr. Farley said, “I used my money to fix something at my home. I didn’t want to spend it on a party and so on, and when I’m looking at my roof I can say to myself that is part of the money I received from that time.”<sup>68</sup> Despite his determination to spend his money to memorialize his family’s loss, without additional financing, Mr. Farley would not have been able to upgrade his roof.

Mrs. Mzi was also able to significantly increase her net assets with the R 11,000 (approximately \$ 1,571) she received; but, unlike Mr. Farley and Mr. Wilson, she is a pensioner of limited means.

**Mrs. Mzi:** I used the money for extending ... It was still a small house. I made some two rooms in the back, and I finished the inside. We did the walls, we painted down here, added the tiles. I changed the light.

**Interviewer:** And was it [the financial award] enough to do all that? Was it enough to put in those two rooms and the ceiling, tiles, and the walls?

**Mrs. Mzi:** No, not at all, but it gave me a start ...

For those of limited means, undertaking a renovation was a piecemeal affair that stretched out over several years. The renovations started at times of high liquidity and stopped when the money ran dry.

Others, like Mrs. Mzi, who were people of humble means, were able to use their meager financial awards to modestly increase their net assets by completing very limited renovations, but over short periods of time. Mr. Moseneke, for example, used his R 10,000 (approximately \$ 1,428) to tile his ceiling and plaster his walls, while Mr. Kagiso used his R 11,000 to make a minor extension to his house. Mr. Kagiso said, “I just put some garage and

extended a little bit, not too much, from here to that window. Yes, that's all, and the money get finished. It was a little money."

In sum, when financial awards had a substantial economic impact, it was primarily because the awards were large enough to allow each recipient to complete some type of home remodeling project. But there were also cases in which smaller financial awards increased net assets because those respondents had the financial wherewithal to combine the awards with their own money to complete major renovations, because they completed only minor renovations, or because they completed substantial renovations in a piecemeal fashion over longer spans of time. Respondents' most common motivation for renovating their homes was to honor those family members who were most affected by the dispossession but died before the post-apartheid government provided compensation. Small financial awards given to claimants who were cash-strapped or did not own homes had little chance of having a substantial economic impact because respondents did not use the awards to, for instance, enroll in job-training classes that would improve their human capital or invest in high-yield, long-term savings instruments.

## 2. Financial compensation had a low economic impact

Respondents in the low economic impact category, on average, received smaller financial awards than respondents in the substantial economic impact category and tended to spend their awards on the needs of everyday living; on non-essentials; or on cultural investments such as tombstones. Despite the size of the financial award, it was likely to have a low economic impact when the pressure to immediately consume the award was too great.

Generally, the findings in this study are consistent with the conclusions of prior studies: those in the low economic impact category received smaller financial awards that were

consumed with no long-term economic benefit.<sup>69</sup> The average amount received by respondents in this category was R 24,068 (approximately \$ 3,438), about one-fifth of the average amount received by those whose financial awards led to a substantial economic impact (see Table 4).<sup>70</sup>

*Generally, the findings in this study are consistent with the conclusions of prior studies: those in the low economic impact category received smaller financial awards that were consumed with no long-term economic benefit.*

The awards received by respondents in the low economic impact category were systematically less primarily because the Originally Dispossessed Individuals (ODIs) were dead and the Commission's policy was to split these financial awards among all descendants of each deceased ODI according to the laws of intestate succession.<sup>71</sup> Mr.Yusef expressed a common frustration with the Commission's decision to provide only symbolic (rather than market-related) compensation and then to divide these small awards among descendants:

If they had given us, like, say, “Okay, this is prime [land] then we will give you R 400,000.” Then you can divide it. “Okay, like, if you are just a single person, then we will come down with

that amount.” But don’t give nine people R 36,000, and the other one is just one particular, he gets the same as you, R 36,000. I mean, look, it doesn’t make sense. At least with R 36,000 you can do something with it. You can buy yourself a nice car. But with R 4,000 what can you do?<sup>72</sup>

Mrs. Doe, who received R 5,000 (approximately \$ 714), agreed with Mr.Yusef and perfectly articulated the frustration of others who also received small awards. When she was asked if the money had changed her life in any way, she responded with great ire, “It was too little to change my mind. This little bit of money, oh my goodness. R 5,000—eish! It’s so little.”<sup>73</sup>

## The general trend

Three distinct patterns emerged in the way respondents in the low economic impact category spent their financial awards. They consistently spent it on the needs of everyday living, on non-essentials, or on cultural investments such as tombstones.

*“I just spent it [the financial award] in the house whenever I run short, you know. I’m a pensioner, and, you know, sometimes, sometimes I run short, you go fetch a little bit of that money and use it in the house.”*

The first trend the interview data reveal is that people in the low economic impact category spent the award on daily survival, which most commonly included expenditures on food and other basic household items. Mr. Colbert's experience was representative. He received R 16,000 (approximately \$ 2,285) and said, "I just spent it [the financial award] in the house whenever I run short, you know. I'm a pensioner, and, you know, sometimes, sometimes I run short, you go fetch a little bit of that money and use it in the house."<sup>74</sup> Like many others, with her small award of R 2,000 (approximately \$ 285), Mrs. Jameson bought "just the household stuff, food [*laughs*] and something I want to, stuff that I couldn't afford to use. I couldn't afford to use my pension on that, so that something extra helped me to buy something." The Ntombena sisters, who were so close that they frequently finished each other's sentences during the interview, each received about R 22,000 (approximately \$ 3,142) and spent it on food and other household items as well. "We bought curtaining [*said in unison*]. I bought curtaining [*laughs*], and a few bedding things, that's all. And food. Most of it went on food because food is so expensive nowadays. You go into a shop now and spend more than R 4,000 for groceries."<sup>75</sup> This first trend shows that people used



their financial awards to create an economic buffer that ensured they were living comfortably above their survival point rather than below it.

The second trend the study reveals is that people in the low economic impact category often spent their financial awards on non-essentials. Mr. Smidt's story was representative. His deceased grandfather was evicted under the Group Areas Act, and Mr. Smidt and his three brothers had to share his deceased father's portion of the award. He stressed that his share was so small that there was no chance that it could have an enduring financial benefit. "But when I got the R 800 and to me it was a



waste of time. I had it in my pocket, and within a second it was gone. I thought I would give it to my mum, but when I got the money it was all gone [*laughing*]. Actually, that little I got, I couldn't do something with it."<sup>76</sup> Mrs. Valley is a thirty-something legal secretary who received about R 3,200 (approximately \$ 457), which was her deceased mother's share of a financial award.<sup>77</sup> Mrs. Valley spent her R 3,200 on CDs and a new refrigerator. "So I enjoyed that [financial award]. I spent it on nonsense actually [*laughing*]. It [the fridge] was just very old, and it was, like, making noises at night [*laughing*]." <sup>78</sup> Mr. Rathod, a retired entrepreneur, took his wife on a trip to the casino with his R 7,500 (approximately \$ 1,071).<sup>79</sup> Respondents who received small awards consistently spent them on non-essentials primarily because there was very little else respondents could imagine doing with such small sums. Investments in home improvements, long-term financial instruments, or small business required more money than they had, while investments in job training and other self improvement ventures required more imagination than same had.

Even when the Commission distributed slightly larger financial awards to people in the upper class, they often still spent them on non-essentials. Prior studies suggest that the

size of an award is the primary variable that determines whether it is consumed or used to increase a recipient's asset base.<sup>80</sup> The data in this study suggest, however, that the percentage of the respondent's income that the award represents is also an important factor worthy of further exploration. There were significantly more upper-class people in the low economic impact category than there were in the substantial impact category.<sup>81</sup> The experience of Mr. and Mrs. Lerato provides insight into this observation.

The Leratos were a sweet old African couple who, after over sixty years of marriage, endearingly referred to each other as "my old lady" and "my man."<sup>82</sup> They were retired teachers who had built an impressively furnished home with custom ceilings in a Pretoria township called Mamelodi. Since their home was already upgraded and they were living comfortably, they used the R 57,000 (approximately \$ 8,142) they received on "this and that."<sup>83</sup> They explained to me that the money did not change anything for them, but it might have made a difference for people who were struggling.<sup>84</sup> Similarly, Mr. Kane was a retired insurance salesman with a comfortable lifestyle. He received R 25,580 (approximately \$ 3,654) and emphasized that he "used the money to enjoy life."<sup>85</sup>

*“I saved it and then I went on a trip to Australia, but I didn’t take all the [restitution] money. I took from my own money also ... We are going to Australia again and New Zealand, and there’s no restitution money.”*

Other financially well-positioned respondents combined their own money with the financial awards to take trips. Mr. Budlender went to Australia with his financial award of R 26,800 (approximately \$ 3,828). “I had money already; I mean it’s saving and working hard and knowing how to turn around your money. I saved it and then I went on a trip to Australia, but I didn’t take all the [restitution] money. I took from my own money also ... We are going to Australia again and New Zealand, and there’s no restitution money.”<sup>86</sup> Mr. Jain, a successful entrepreneur, used his financial award of R 30,000 (approximately \$ 4,285) to take one of his several trips to Mecca. Likewise, Mrs. Smith—a well-off Coloured woman whose family emigrated to Australia during the apartheid years—received an award of R 85,000 (approximately \$ 12,142) and used the money to finance a vacation back to South Africa. In sum, people who received small financial awards often spent them on non-essentials because

there is little else they could imagine doing with the money. Upper-class people who received larger awards also spent them on non-essentials because the awards were small in relation to their overall wealth and thus viewed as extra money to play with.

The third trend my analysis shows is that making an economic investment was not a priority for respondents in the low economic impact category. Instead, they were more concerned with making cultural investments through the purchase of tombstones. Interestingly, people in all categories—substantial, moderate, and low economic impact—purchased tombstones. But, while respondents in the substantial economic impact category usually used their financial awards to make home improvements *and* purchase tombstones, respondents in the low economic impact category often had only enough financing to buy the tombstones, foregoing home improvements and the like.<sup>87</sup>

Mrs. and Mr. Sibanda, the brother-sister duo, explained the importance of a tombstone. Mr. Sibanda said that its purpose was “to be remembered by all.”<sup>88</sup> The sister chimed in and added that “it’s for us to get our great-great-great-great-grandchildren to know where their great-great-great-grandfather or grandmother is. That’s the meaning for a tombstone for us.”<sup>89</sup>

Mr. Lesedi offered another view of the importance of tombstones: “You know, you never really live comfortably in your life after your parents have died and there’s no remembrance. A tombstone is a ... it’s a symbolic gesture to say we thank you for having brought us into this world, number one. And secondly we cannot afford to forget you, and thirdly that each time obviously when there’s no tombstone the grave perpetually becomes ... it’s neglected.”<sup>90</sup>

*“I think all of us here in South Africa, putting a tombstone on your mother’s or in your sister’s grave, it is something very big. It is like you paying your respects; you are saying, ‘I am building a house for you as I am staying in the house.’”*

Many of the owners and occupants who were evicted during apartheid died before they were able to see the day when the new democratically elected government would provide compensation for the atrocious injustices executed by the previous governments. Mrs. Ngcobo insisted that erecting tombstones was a way to replace the houses the deceased lost by building them homes in their final resting places. She said that, “I think all of us here in South Africa, putting a tombstone on your

mother’s or in your sister’s grave, it is something very big. It is like you paying your respects; you are saying, ‘I am building a house for you as I am staying in the house.’”<sup>91</sup> Mrs. Nthabi echoed a similar sentiment when she said that “I even told my sister that if they gave me this money I’m gonna make a tombstone for my parents ... I won’t enjoy it and I don’t want to enjoy it because it’s for my parents, I must do it for my parents so that they can sleep well.”

In sum, the dominant patterns are that respondents in the low economic impact category spent their financial awards on the needs of everyday living; on non-essentials; or on tombstones. In addition to these three patterns, the data also reveal a fourth trend, an interesting correlation between a respondent’s age and how she or he spent the money. Since older people have larger portions of their lives behind them than ahead of them, one might hypothesize that this group would *not* be so concerned with the long-term economic benefit of their financial awards. The data support this hypothesis, and the experience of the Maru family is illustrative.

Mr. Maru submitted a claim on behalf of his aged, ailing mother, who used the money for her immediate medical needs. He said, “My mother was still alive at that time. So we,

we decided whatever the money, when the R 40,000 came, it went straight to her. She did, *ewish*, she, it did help her because she had a medical problem. She had a stroke, and then it helped to pay for her medical. She was here [at home] for two and a half years, bedridden, so we had to get the specialized beds and things.”<sup>92</sup> Like many other older claimants, Mrs. Maru’s priority was not to make a long-term economic investment; because she was approaching the end of her life, satisfying her immediate needs was paramount.<sup>93</sup>

## Exceptions to the general trend

As revealed in prior studies, those in the low economic impact category received smaller financial awards that were consumed with no long-term impact. There were four cases in the study, however, in which respondents received larger awards but nevertheless experienced a low economic impact. In three of these cases, the respondents received sizable awards but decided to make hefty cultural investments through the purchase of several tombstones. Mrs. Madala received a large award of about R 113,000 (approximately \$ 16,142) as compensation for the eviction of her husband’s parents,

so her priority was to build tombstones for her husband and in-laws. “I just said, ‘This is my husband’s parent’s money.’ And I took that money and, I’m telling my true story, I took that money and made tombstones for them. Yes, because it was their money.”<sup>94</sup> Mrs. Madala is a pensioner with a beautiful home in the township of Mamelodi, which had already been extended and upgraded. She lived comfortably, and her children are grown and successful, and also have their own houses. Usually a person in her situation is likely to spend the award on non-essentials, but since she deeply believed that the money rightfully belonged to her in-laws and husband, she spent the money to benefit them.

The last case involved the Goodes, a Coloured family from Kliptown, a small town near Soweto, Johannesburg. The apartheid government stole fourteen properties from Wayne Goode; and as part of the land restitution process, the Commission made an attempt to “wipe their tears” by giving the family R 840,000 (approximately \$ 120,000) in compensation. Mr. Goode’s daughter talked about how a humble Coloured chauffeur was able to acquire fourteen properties during apartheid:

**When he used to come home week-ends then he’ll start building, improving himself. I suppose he wanted to leave work; he was a chauffeur where**

he worked, and Saturdays and Sundays he used to be busy building, and then when one room is finished he would hire it out. He had nobody else to help; he was also earning a small wage. That is how he built from room to room and then have enough and buy another place and then go on building. He was a very hard worker. He never drank or smoked; he was just a hard worker.<sup>95</sup>

The apartheid government ruthlessly took away everything Mr. Goode had worked tirelessly to acquire and paid him a farthing. Inexplicably, one year after Kliptown was declared a white area and Mr. Goode and all other Coloureds were callously removed, the apartheid government reclassified it a Coloured area; but, in a particularly cruel move, the apartheid government did not return the expropriated houses to their original owners. After this heartbreaking experience, Mr. Goode and his wife moved to Lesotho because he could not countenance being evicted once again. He died in Lesotho a bitter man. The government moved the rest of his family to Protea, another township just outside of Johannesburg, and after they had once again established themselves, the apartheid government again evicted them and forced them to move to El Dorado Park, where they lived at the time of the study. I interviewed Mr. Goode's granddaughters, Mrs. Reed and

Mrs. Douglass, who each received a financial award of R 65,000 (approximately \$ 9,285) and his daughter, Mrs. Gains, who received R 210,000 (approximately \$ 30,000).

In accordance with evidence in prior studies, the relatively large financial award increased Mrs. Reed's net assets; she used the money to upgrade her home and purchase a taxi. In contrast, the sizable financial award did not significantly improve the net assets of Mrs. Douglass or Mrs. Gains. All three women were from the same family, were not educated beyond standard five, and were either divorced or widowed and so did not have husbands to rely on. Given their similarities, why the different outcomes? Their stories bring to light an important observation: the financial needs of those economically dependent on the respondent played a large role in how the compensation was used.

Mrs. Douglass and Mrs. Gains used the bulk of their money on their financially dependent adult children. Mrs. Douglass' only daughter had been ill for some time (and was deceased at the time of the interview); Mrs. Douglass used part of her money to pay for her grandson's private secondary school tuition and to pay for the upkeep of the home where they were residing. She said, "Isn't it, I was feel-

ing sorry because at the time she wasn't feeling well. I had to help her with the child to keep in school. If I didn't pop out money, the child wouldn't make it to school. I don't know if what is gonna happen to the child.”<sup>96</sup> Likewise, Mrs. Gains explained that she used her money to support her unemployed children and grandchildren:

Here I'm sitting with nothing. Maybe it is my fault. Maybe I was too lenient with the children, feeling sorry for them because your children you borrow them, you never get it back. A person you must not concentrate on the children because your children can sometimes be your enemies. I've got grandchildren, big children, the one says, “Mommy, borrow me this,” so you give there and you end up with nothing. I can't say the one son borrows, “Mommy, I'll give you,” and the other son also borrows, and the

children don't give you back what they take from you. So now I'm really living on my pension. What can I do if they don't give? And besides they're not working.”<sup>97</sup>

In contrast, Mrs. Reed's three daughters were economically self-sufficient individuals who were waitressing in America and London to make money. Mrs. Reed combined her financial award with her daughters' earnings and purchased their first taxi. After continually reinvesting their profits, they built a thriving enterprise of five taxis. The lesson is that, despite the size of the financial award, if the recipient is unemployed and the sole breadwinner for a large group of destitute and dependent people, then the award is not likely to increase her net assets because the pressure to immediately consume the award is too great.



# POLICY RECOMMENDATIONS

Given the impracticality of limiting equitable redress to land restitution, the Commission must take steps to ensure that financial awards produce enduring economic benefits. The Commission can accomplish this by increasing both the impact of smaller financial awards and the size of the awards generally.

In its early years, the Commission focused on distributing financial awards. The Commission has changed gears and is now de-emphasizing the financial compensation option and emphasizing land restitution partly because its dominant institutional belief is that, overall, financial compensation had absolutely no long-term economic benefit for recipients. This study suggests that this assumption is false; in fact there was a sustainable economic impact in about one-third of the cases in the sample. Nevertheless, based on its questionable conclusion, the Commission has now indirectly taken the financial compensation option away from the remaining claimants (who are mostly claiming rural lands) and is persuading them to choose land restitution.

The Commissioner for the Eastern Cape described how the financial compensation option has been de-emphasized: “The Act gives the option of cash, so people don’t want development; but, if you minimize the financial and accentuate development, the community goes along.”<sup>98</sup> A project officer from the Western Cape shared his personal experience with the Commission’s post-2007 policy of de-emphasizing the financial compensation option:

**Now we don’t encourage it [financial compensation]. But before in the options workshop we presented all options comprehensively; but we realized people want quick cash, so we now present development comprehensively. When we talk about financial compensation, we run quickly through it because the same people who have been settled come back to**

seek land via other programs. This is why we are pushing development.<sup>99</sup>

Another method the Commission has used to discourage claimants from choosing financial compensation is making the financial awards small. A deputy director at the Commission said, “We need to give low amounts so people choose land. In Wallmansthal [a rural land claim located near Johannesburg], financial compensation is R 20,000, so many are not choosing it. I think we should be able to force claimants to choose land.”<sup>100</sup> The director general confirmed that, by official policy, “financial compensation is less in value than land, and this is done to discourage people from taking financial compensation. This is in line with practice in Germany and Estonia.”<sup>101</sup>

*But it does not make sense to limit claimants’ choices to land transfer when bureaucratic incapacity has drastically reduced the value of this option.*

Because it is working on the assumption that financial compensation had absolutely no enduring economic effect for recipients, the Commission’s strategy with the remaining claims is to transfer land to communities and de-emphasize the financial compensation option. But it does not make sense to limit claimants’ choic-

es to land transfer when bureaucratic incapacity has drastically reduced the value of this option. The available evidence suggests that the Commission’s attempts to transfer land to claimants have failed on several counts.

First, transferring land to individuals and communities takes the Commission an extremely long time. Tragically, while beneficiaries wait for the Commission to produce results, the people most affected by the evictions (ODIs) are dying; people are losing faith in the process and becoming disillusioned; and land prices are steadily rising, which decreases the amount of land the Commission can purchase given its limited budget.<sup>102</sup>

Second, even when the Commission has transferred land to communities, ensuring that the community is able to use the land effectively has posed a serious challenge. There are numerous reports of communities receiving agricultural land and not having the resources to develop it or to continue existing farming operations; additionally, in some instances weak governance structures have caused community disputes to proliferate.<sup>103</sup> Consequently, there are several cases in which the land that communities have received from the Commission is lying fallow or is underused.<sup>104</sup>

This shortcoming is not completely the

Commission's fault because its original political mandate extended only to determining and distributing equitable redress, but it has found that once it transfers land to claimants, they require significant post-settlement support.<sup>105</sup> The Commission does not have the organizational competence to provide these services; however, the Department of Agriculture does.<sup>106</sup> Despite its supposed expertise, many of the farms the Department of Agriculture has transferred to beneficiaries are also failing.<sup>107</sup> Since the state has proven it has limited capacity to transfer land, then it must find ways to make financial compensation more effective, instead of removing it as an option altogether. To do this, I argue that the Commission should increase the economic impact of smaller awards and increase the amount of financial awards.

## I. Increase the economic impact of smaller financial awards

The Commission should create various types of financial awards and provide incentives for claimants to

make choices that result in an enduring economic benefit. The Commission should also provide financial counselors who ensure claimants are aware of all of their choices.

Forcing people to choose land restitution is not the correct policy direction, but giving people meaningful choices is. In a prior article, I argued that when dispossession is part of a larger strategy of dehumanization, it involves more than just the confiscation of an individual or community's property; it involves an attempt to confiscate people's humanity and remove them from the social contract.<sup>108</sup> This leads to what I call *property-induced invisibility*.<sup>109</sup> I argue that in the face of property-induced invisibility, the state's task is not just to compensate the dispossessed for past property violations, but to do it in a way that reintegrates them into the social contract and makes them visible. That is, the state's responsibility is to restore dispossessed individuals and communities to their rightful place in the polity.

"Reparations is the return of property that does not emphasize rebuilding a relation-

ship to society, while *restoration* is the return of property that emphasizes rebuilding a relationship to society through asset-based choices.”<sup>110</sup> Restoration is about giving the dispossessed a choice as to how they are compensated and allowing them to decide the terms of their inclusion into the social contract.<sup>111</sup> The Commission could allow the individuals or communities that were wrongfully evicted to choose from these options: the return of their land; the receipt of alternative land (if their original land is no longer available); financial compensation; or a series of in-kind benefits. In-kind benefits could include, for instance, free higher education for five family members, subsidized access to credit, or priority in an already established housing program.

*Reparations is the return of property that does not emphasize rebuilding a relationship to society, while restoration is the return of property that emphasizes rebuilding a relationship to society through asset-based choices.*

Although choice is essential to a meaningful and successful land reform process, the Commission is intent on reducing the available choices by eliminating the financial compensation option. The superior policy choice is for the Commis-

sion to maintain the financial compensation option and also distribute vouchers in lieu of cash to ensure that financial awards systematically have a long-term economic impact. For example, if the Commission wants to promote home improvements, a person entitled to a R 20,000 financial award should also have the option of instead receiving a R 30,000 voucher to purchase building materials from a home improvement store that has partnered with the Commission. Likewise, if the Commission wants to encourage beneficiaries to use their financial awards to improve their human capital, then it could offer a 25 percent increase in the financial awards when they are used to make payments directly to qualifying educational institutions. The key is to give beneficiaries choice and to incentivize (not force) them to use their financial awards such that they have a lasting economic impact.<sup>112</sup>

*Although choice is essential to a meaningful and successful land reform process, the Commission is intent on reducing the available choices by eliminating the financial compensation option.*

To increase the likelihood that financial awards (especially smaller ones) have an endur-



ing economic impact, the Commission should provide a financial counseling session for each financial award recipient. Financial advisors would give a comprehensive description of the various kinds of financial awards and assist claimants in planning how to spend the award. Tozi Gwanya, the director general of land affairs, agrees with this approach.

**We should have provided financial advice on how to spend the compensation like they do when you win the lottery. This did not happen because of the weakness of officials. This should happen in the options workshop. We did force beneficiaries to open bank accounts to get the money, but Absa [a major South African bank] did not do what they were asked; the banker was supposed to provide financial advice. The weakness is that the bank sells their products and not broader financial instruments.**<sup>113</sup>

While the choice-centered approach I propose is strong, it is far from perfect. There are three primary challenges: First, it demands a highly efficient, noncorrupt bureaucracy that is able to determine the available choices.<sup>114</sup> The

Commission may not be up to the challenge. Second, the choices must have wide appeal because a choice between highly undesirable options is no choice at all. The process of determining the available options has the potential to occur in a top-down manner; but the options will not have wide appeal if claimants are not involved in crafting them. Consequently, it is extremely important that the Commission ensures that claimants are meaningfully involved from the beginning in crafting the available options.

Third, and most important, providing a creative range of choices for claimants will not change the skewed land ownership patterns that have stymied South Africa's democracy since its inception. The fact that whites, who constitute less than 10 percent of the population, now own over 82 percent of the arable land is a radical injustice, and the policy recommendations suggested in this study do nothing to address this.<sup>115</sup> This means that the other two prongs of the land reform process (land redistribution and tenure reform) must bear the full weight of correcting this severe imbalance.<sup>116</sup> But, this is okay because land restitution is unique. It is the part of the land reform strategy that should be predicated on choice because some individuals and communities



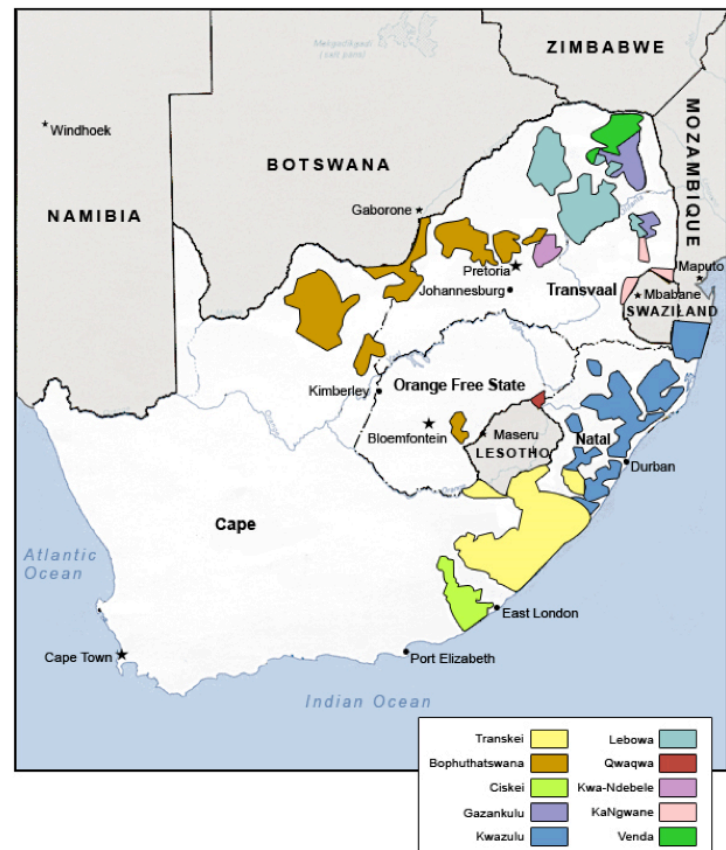
whose land was stolen decades ago are no longer interested in land restitution because they now have other priorities.<sup>117</sup>

## 2. Increase the amount of financial awards

The Commission should increase the amount of financial awards by ensuring it does not overpay current landowners so that it can use the savings to purchase more land for dispossessed populations. The Commission should also increase the sum given to beneficial occupants to match what it gives dispossessed owners.

### Do not overpay current landowners

This study confirms the observation that larger financial awards are more likely than smaller awards to have an enduring economic



impact.<sup>118</sup> Consequently, it is important to explore ways in which the Commission can increase the amount of financial awards. One way the Commission can do this is by paying current landowners just compensation rather than Fair Market Value (FMV).

According to the constitutional bargain made in 1994, whites—who, as a consequence of apartheid and colonial-era land theft, then owned 87 percent of the fertile agricultural land despite being only 10 percent of the population—would get to keep the property in their possession, regardless of how it was acquired. In exchange, blacks received the promise of land reform. If the ANC had not conceded to this seemingly unfair liberation bargain, then

white minority rule might not have ended without a blood-drenched civil war and without destroying the economy that the ANC would inherit. But the bargain came at a high cost: it further reinforced existing structural inequalities among the races.

Whites immediately received the benefits of the bargain because the democratic regime legitimated and constitutionally protected their property rights as soon as it came into existence. Thus, if the government used its powers of eminent domain to take the land for redistribution, it would have to pay just compensation, which is a market-related calculation.<sup>119</sup> In contrast, Africans have a constitutional right to equitable redress, which in urban areas unfortunately has translated into a symbolic financial award that has no relation to the past or current market value of the properties in question. In short, whites get market-related compensation, and Africans get symbolic compensation. As a result of this compensation-based, structural inequality, from its inception in 1995 to March 31, 2008, the Commission spent R 7.8 billion to acquire land (paid mostly to white farmers to acquire their land) and only R 4.9 billion to distribute financial compensation (paid primarily to dispossessed African communities and individuals).<sup>120</sup>

*As part of the constitutional bargain, the liberation parties nimbly negotiated to have the state take FMV into account in addition to several other equity-enhancing factors when paying just compensation. Nevertheless, my interviews with Commission officials revealed that when the Commission acquires land, it often pays the FMV without regard to the other equity-enhancing factors.*

Although whites must receive just compensation when the state expropriates their property, the constitutional bargain ensured that the calculation of just compensation is not based on FMV alone. According to section 25(3) of the South African constitution,

**the amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation.**<sup>121</sup>

As part of the constitutional bargain, the liberation parties nimbly negotiated to have the state take FMV into account in addition to several other equity-enhancing factors when paying just compensation.<sup>122</sup> Nevertheless, my interviews with Commission officials revealed that when the Commission acquires land, it often pays the FMV without regard to the other equity-enhancing factors. There are several reasons behind this phenomenon.

Negotiated land reform (that is, involving willing sellers and willing buyers) is the principal method of land acquisition.<sup>123</sup> But it gives current landowners a serious advantage in negotiations because the supply of farms for sale is small, the demand is high for particular properties due to ancestral connections or proximity to established communities, and the transaction costs involved in rejecting landowners' offers and starting the process again are high as well.<sup>124</sup> The landowners' advantage is solidified by the poor negotiation skills of Commission officials (who are not trained in negotiation) and ineffective service providers who do not properly research the equity-enhancing factors of properties as part of the valuation process.<sup>125</sup> As a result, the Commission has paid at or above the market price for properties, and

the equity-enhancing factors negotiated by the liberation parties have been ignored. The Commission must reduce the substantial amount it is paying to white farmers by abiding by the constitution's equity-enhancing factors found in Section 25(3) so that it can increase the meager financial awards it distributes.

The primary downside of taking into account the equity-enhancing factors is that doing so requires extensive research into the history of each plot of land and one researcher's findings can vary widely from another's. This uncertainty leaves current owners unsure of their land's worth and can hamper investment and trade.<sup>126</sup> In addition, one primary reason that the Commission and the Land Claims Court have largely ignored the equity-enhancing factors is that they are extremely difficult to incorporate into a calculation that determines a plot of land's value.<sup>127</sup> If, for example, a researcher successfully outlines a property's history, it is still not clear how this should impact its value; or if the apartheid state subsidized a property's initial acquisition, it is not clear whether this should impact the current owner. Despite the challenges, the equity enhancing factors are a key part of the liberation bargain that the Commission cannot ignore. If the Commission and

the Land Claims Court establish clear rules for enforcing the equity-enhancing factors and implement them consistently, then these challenges will diminish. This, however, has yet to happen.

## Increase the financial awards beneficial occupants receive

Another way that the Commission can increase the minimum award size is to stop paying dispossessed owners more than dispossessed tenants. In most provinces, dispossessed tenants received approximately R 25,000, while dispossessed owners received R 60,000 or more.<sup>128</sup> The only province that has never distinguished between dispossessed owners and tenants and has treated both equally is Gauteng, and as a result, the average financial award in Gauteng is higher than in other provinces like the Western Cape (see Table 2). Gauteng stands alone because it did not comply with the legal advice that dispossessed owners were entitled to more compensation than dispossessed tenants because they had ostensibly lost more. Gauteng's progressive policy was instituted by its early regional land claims commissioner, Blessing Mphela, who strongly believed that the

political objective of restitution—to eliminate the divisions of the past—was the most important and overriding consideration. He believed that treating dispossessed owners better than tenants reinforced the inequalities of the past.

*Another way that the Commission can increase the minimum award size is to stop paying dispossessed owners more than dispossessed tenants.*

During apartheid, an ownership disparity existed among nonwhites as part of apartheid's racial hierarchy: Africans were at the bottom, whites were at the top, and Coloureds and Asians occupied the liminal space between the two.<sup>129</sup> The prohibition against African land ownership solidified their position at the bottom of the racial hierarchy.<sup>130</sup> Coloureds and Indians had relatively more opportunities to own land, although they were also heavily encumbered by restrictions on ownership.<sup>131</sup>

The Act, however, attempts to equalize these past ownership disparities, as its inclusive definition of *right in land* places everyone on equal footing. “[R]ight in land” means any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrange-

ment and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.”<sup>132</sup> Under the Act, tenants who occupied their home for ten years or more prior to dispossession are beneficial occupants, and in the interest of justice, the Act places them on equal footing with claimants who possess more formal registered rights.

But the Commission ignores the concept of beneficial occupation when it distributes financial compensation and treats everyone without a deed as a tenant. In Paarl—which prior to the Group Areas Act was a mixed-race community in the Western Cape’s scenic wine country—initially owners were paid R 40,000 while tenants were paid a mere R 25,000.<sup>133</sup> Since Africans could not own land in Paarl because of the discriminatory practices of the apartheid government, for reasons of equity it is important that the Commission pay beneficial occupants the same amount as owners. Failing to do so simply reinforces the injustices committed by the apartheid government; but sadly the Commission has not treated beneficial occupants on equal footing with owners with registered rights. If the Commission changes its policy and pays beneficial occupants the same amount as owners, then it will also successfully

increase the average award.

The downside of acknowledging beneficial occupants is that it can already be a serious challenge to determine whether a claim of dispossession meets the statutory requirements and is valid. It may be asking too much to require the Commission, in addition to this, to determine whether the claimant lived on the property continuously for ten years or more prior to being evicted and thereby qualifies as a beneficial occupant. Despite the difficulties, the Commission must change its insistence on giving former owners a higher financial award; ignoring the category of beneficial occupation is a policy that reinforces apartheid’s legacy instead of dismantling it.

In sum, Mr. Nkwinti—who since the study’s completion has become the Minister for Rural Development and Land Reform—declared that “depending on the type of political choices we make, and the decisions we take now, the type of administrative actions we take, the processes, procedures and institutions we put in place, will either bring about the desired social cohesion and development or will perpetuate the colonial-apartheid’s social fragmentation and under-development.”<sup>134</sup> The correct administrative action is for the Commission to reverse its policy of effectively remov-



ing the financial compensation option. Instead, the Commission should increase the economic impact of smaller financial awards by (1) allowing claimants to choose between various forms of equitable redress, while providing incentives for claimants to choose the methods that will produce a long-term economic benefit, and (2) providing financial counseling to claimants

who elect to receive financial compensation.<sup>135</sup>

The Commission should also increase the size of financial awards by (1) taking the equity-enhancing factors into account and using the consequent savings to increase the financial awards for dispossessed populations, and (2) taking seriously the category of beneficial occupation.

# CONCLUSION

The Commission has assumed that financial compensation did not contribute to economic development because the money has been spent and ostensibly people's financial positions have not changed. Based on this assumption, the Commission has, in practice, removed the financial compensation option. But, this study finds that financial awards produced enduring economic benefits for 30 percent of respondents so the Commission should rethink its policy choices in light of this new empirical evidence.

South Africa's Land Restitution Program is one of the boldest attempts made by a transitional nation to address past property violations. By settling the majority of urban claims, the Commission has completed a herculean task and accomplished what many thought was impossible. If, in its early days, the Commission had not focused on distributing financial awards instead of land restitution, then it would have accomplished much less because of the difficulties involved in land restitution. Based on anecdotal information, however, Commission officials have concluded that financial compensation did not have any long-term economic benefits and has failed to contribute to the na-

tion's goal of economic transformation. Using data from eighty semi-structured interviews of claimants who received financial compensation, this study's findings contradict the Commission's conclusion because financial compensation had a substantial economic impact for 30 percent of respondents.

Prior empirical studies that have explored the effects of financial awards and other windfall payments have concluded that larger payments result in an increase of net assets while smaller awards are consumed with no long-term impact.<sup>136</sup> The results of this study are generally consistent with this conclusion, but there are several important additional observations:

First, respondents who received larger financial awards were generally able to increase their net assets through investments in their homes. People who received smaller awards had to combine the awards with their own finances to complete substantial home improvements; or complete less ambitious renovations in a piecemeal fashion when funds were available; or undergo limited renovations that in turn only modestly increased the value of their homes. The majority of respondents who renovated their homes were not motivated by the economic benefits, but rather they were trying to honor their family members who died before the post-apartheid state compensated them. It was not likely that poor claimants who received small financial awards or who did not own homes would experience an enduring economic benefit because the Commission did not create opportunities for people to use the awards to improve their human capital by, for instance, taking classes.

Second, the majority of respondents whose financial awards did not produce a long-term economic benefit either received small awards or awards that constituted only small percentages of their overall net worth. In these cases, respondents often spent the money on daily survival or non-essentials. Third, many

people were interested in making cultural rather than economic investments. People who received larger financial awards were usually able to purchase tombstones and renovate their homes, whereas those who received smaller awards had enough financing only to purchase tombstones, but not to invest in their homes.

Fourth, given their limited remaining life span, older people had less interest in spending their financial awards in ways that would produce a long-term economic impact. Lastly, the financial capacity of the respondents' children played a large role in how respondents used their compensation. If the recipient was the sole breadwinner for a large group of unemployed and economically dependent family members, then the financial award was not likely to increase her net assets because the pressure to immediately consume the money in support of family members was too great.

To ensure that financial awards have an increased economic impact, this study suggests two policies. First, the Commission should stop de-emphasizing the financial compensation option. Instead, the Commission should make financial counselors available who will assist claimants in choosing between various types of financial awards including in-kind options. The second policy suggestion addresses the fact

that the Commission is paying current landowners fair market value for their properties when the constitutional bargain mandates only just compensation, which can be a significantly lower amount. The Commission should stop overpaying current landowners and instead use the savings to increase the minimum financial award. Third, the Commission should increase the average financial award by paying beneficial occupants the same amount it pays those dispossessed owners who possessed more formal registered rights.

The racially motivated evictions carried out under colonial and apartheid-era regimes severely violated the human rights of millions of South African citizens. Families were economically hobbled, and invaluable social bonds were destroyed. The tears of these families have wet the pages of history and made them heavy with despair; and to its credit, the South African government has used financial compensation as one mechanism to try to wipe away these tears. While its efforts to date have been noble, there is much work to be done.

1. See e.g. CONFRONTING PAST INJUSTICES: APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY (Medard R. Rwelamira & Gerhard Werle, eds. 1996); Richard W. Crowder, *Restitution in the Czech Republic: Problems and Prague-Nosis*, 5 IND. INT'L & COMP. L. REV. 237, 238 (1994); Istvan Pogany, *The Restitution of Former Jewish-owned Property and Related Schemes of Compensation in Hungary*, 4(2) EUR. PUB. L. 211, 211 (1998); Frances H. Foster, *Restitution of Expropriated Property: Post-Soviet Lessons for Cuba*, 34 COLUM. J. TRANSNAT'L L. 621, 626 (1996); Mark Everingham, *Agricultural Property Rights and Political Change in Nicaragua*, 43 LATIN AM. POL. & SOC'Y 61 (2001); Michael Fischbach, *Settling Historical Land Claims in the Wake of Arab-Israeli Peace*, 27 J. PALESTINE STUD 38 (1997); Álvaro Del Carpio León, *Analysis and Possible Improvements of the Land Restitution Process in Guatemala* (2005) (unpublished M.S. thesis, International Institute for Geo-Information Science and Earth Observation), available at [http://www.itc.nl/library/Papers\\_2005/msc/gim/del\\_carpio.pdf](http://www.itc.nl/library/Papers_2005/msc/gim/del_carpio.pdf).
2. See S. AFR. CONST. 1996 s. 25.
3. See DL CAREY MILLER, LAND TITLE IN SOUTH AFRICA 1-44 (2000); See generally LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA (1995).
4. *Supra* note 2.
5. The South African constitution's sections 25(1), 25(5) and 25(6) give the state authority to secure land tenure and redistribute land. Sections 25(2) and 25(4) allow the state to expropriate property for redistribution and Section 25(3) requires the state to consider the property's history when calculating just and equitable compensation. *Id.*
6. See DEP'T OF LAND AFFAIRS, S. AFR., GREEN PAPER ON SOUTH AFRICAN LAND POLICY 37 (1998). See also DEP'T OF LAND AFFAIRS, S. AFR., WHITE PAPER ON SOUTH AFRICAN LAND POLICY s. 4.14.2 (1998); Klaus Deininger & Julian May, *Can There Be Growth with Equity? An Initial Assessment of Land Reform in South Africa* (World Bank Policy Research Working Paper No. 2451, 2000) ("Following a number of earlier legal interventions with similar goals, the Native Lands Act of 1913 prohibited the establishment of new farming operations, sharecropping, or cash rentals by blacks outside of the reserves, which made up only 7.6 percent of the country's area).
7. The functions of the Commission were set out in *Mahlangu N.O. v. Minister of Land Affairs & Others* 2005(1) SA 451 (SCA) (S. Afr.).
8. See COMMISSION ON RESTITUTION OF LAND RIGHTS ANN. REP. 1 APRIL 2007—31 MARCH 2008 5 (2008) (S. AFR.) (noting that of the total claims settled, financial compensation accounted for 51,973 claims, land for 19,862 claims, and alternative remedies for 2,912 claims).
9. There are several key differences between urban and rural restitution. Rural claims often involve land owned collectively by sometimes upwards of 2000 individuals and families; while urban claims often involve one family or individual. As of 2008, 49 percent of rural claimants opted for the restitution of large tracts of rural land, which involves negotiations with present owners and the ability to sustain existing agricultural enterprises. In contrast, only 24 percent of urban claimants opted for land restitution while 73 percent opted for financial compensation. Another important difference is that when urban claimants do opt for land restitution, the Commission has given many claimants publicly owned, small plots of land with no existing productive use.
10. See generally KENNETH KIRKWOOD, THE GROUP AREAS ACT (1951); Alan Mabin, *Comprehensive Segregation: The Origins of the Group Areas Act and its Planning Apparatuses*, 18 J. SOUTHERN AFR. STUD. 405 (1992) (describing the Group Areas Act's motivation to keep Indians, whites, and blacks segregated according to racial zones).
11. See LAURINE PLATZKY & CHERRYL WALKER, THE SURPLUS PEOPLE: FORCED REMOVALS IN SOUTH AFRICA 10 (1985).
12. I use pseudonyms for all the respondents who were not employees of the Commission in order to protect their privacy.
13. See confidential interview with a former resident of Marabastad, in the

Gauteng region, S. Afr. (2008).

14. The rand-dollar exchange rate used in this study is R 7=\$ 1.

15. See MELVIN OLIVER & THOMAS SHAPIRO, BLACK WEALTH WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 5-6 (1997) ("Just as blacks have had 'cumulative disadvantages,' many whites have had 'cumulative advantages.' Since wealth builds over a lifetime and is then passed along to kin, it is, from our perspective, an essential indicator of black economic well-being. By focusing on wealth we discover how black's socioeconomic status results from a socially layered accumulation of disadvantages passed on from generation to generation."). See generally JOHN BRITAIN, THE INHERITANCE OF ECONOMIC STATUS (1977) (investigating social mobility and intergenerational transfer of wealth using regression analysis to predict the son's economic status based on parental characteristics).

16. *Id.*

17. Restitution of Land Rights Act 22 of 1994, as amended by Act 48 of 2003, Preamble (S. Afr.).

18. See COMMISSION ON RESTITUTION OF LAND RIGHTS ANN. REP. 1 APRIL 2007—31 MARCH 2008 59 (2008) (S. AFR.).

19. First, empirical data suggests that it is not a tribunal's final decision but rather the perceived fairness of the process that affects people's views of an outcome's legitimacy. I will test whether this holds in the context of the South African restitution process. Second, people were focused on making a range of investments with their restitution award—both economic and cultural. I will explore the cultural and symbolic importance of using the restitution award to purchase tombstones. Third, in prior work I argue that when a regime confiscates property as part of a larger project of dehumanization, people are removed from the social contract and property-induced invisibility results. In these instances, the task of the transitional regime is not merely to give the property back, but rather to do so such that the dispossessed are integrated into the social contract and made visible. I argue that what can accomplish this task is restoration, which is compensation for past property violations that is predicated on agency and choice. I will test this hypothesis by exploring whether a respondent's ability to choose her restitution award positively affects her relationship to the state. See generally Bernadette Atuahene, *From Reparations to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1420 (2007).

20. I am not claiming that respondents who spend their award such that it has a substantial economic impact are more virtuous or better positioned than those whose expenditure fell into the low economic impact category.

21. See generally Andrew Goodman-Bacon & Leslie McGranahan, *How Do EITC Recipients Spend their Refunds?*, 32 ECONOMIC PERSPECTIVES 17 (2008); Lisa Barrow & Leslie McGranahan, *The Effects of the Earned Income Credit on the Seasonality of Household Expenditures*, 53 NAT'L TAX J. 1211 (2000) (finding that EITC spending is more focused on durable rather than non durable goods.).

22. *Id.*

23. See generally MILTON FRIEDMAN, A THEORY OF THE CONSUMPTION FUNCTION (1957).

24. See Mordechai Kreinin, *Windfall Income and Consumption—Additional Evidence*, 51 AM. ECON. REV. 388 (1961). See also Margaret Reid, *Consumption, Savings and Windfall Gains*, 52 Am. Econ. Rev. 728 (1962) (finding considerable support for Friedman's permanent income hypothesis). But see Ronald Bodkin, *Windfall Income and Consumption*, 49 AMERICAN ECONOMIC REVIEW 602 (1959) (finding that there was a strong propensity to spend windfall income); Roger Bird & Ronald Bodkin, *The National Service Life Insurance Dividend of 1950 and Consumption: A Further Test of the 'Strict' Permanent Income Hypothesis*, 73 J. OF POLITICAL ECON. 602 (1965).

25. Michael Landsberger, *Windfall Income and Consumption: Comment*, 56 AMER. ECON. REV. 534 (1966) (finding that Israeli recipients of large restitution awards had a lower marginal propensity to consume than those



who received the smallest awards.). For a more recent study that engages Landsberg's work see Bertrand, Mullainathan & Shafir, *Behavioral Economics and Marketing in Aid of Decision Making Among the Poor*, 25 J. OF PUBLIC POL'Y & MKTG. 8, 15 (2006) (citing to Landsberger's study of German restitution for Israelis and noting that "among the non poor, small (versus large) amounts are more likely to be spent than saved.").

26. *Id.* See also Conrad Doenges, *Transitory Income Size and Savings*, 33 SOUTHERN ECON. J. 258, 261-62 (1966) ("the tendency to save is stronger when the receipt is greater than \$500, or greater than 4.0 per cent of gross income. Alternatively, the tendency to consume is stronger when the receipt is less than \$200, or less than 2.0 per cent of gross income."); Abdel-Ghany et. al, *Windfall Income and the Permanent Income Hypothesis: New Evidence* 17 J. OF CONSUMER AFFAIRS 262, 273-74 (1983) ("The OLS instrumental variables analysis provide clear support for Friedman's permanent income hypothesis when the windfall income is small relative to regular income, the marginal propensity to consume windfall income is greater than the marginal propensity to consume regular income, thus rejecting Friedman's permanent income hypothesis."); Keeler, James & Abdel-Ghany, *The Relative Size of Windfall Income and the Permanent Income Hypothesis*, 3 J. OF BUSINESS AND ECON. STATS. 209 (1985)(finding "[a] pattern of a declining marginal propensity to consume windfall income as the relative size of the windfall increases is apparent.").

27. As the field of consumption theory has developed over the years, more recent studies using more advanced techniques have confirmed Friedman's hypothesis as well. See e.g. Christopher Carroll, *A Theory of the Consumption Function, with and without Liquidity Constraints*, 15 J. OF ECON. PERSPECTIVES 23 (2001)("It turns out that when there is meaningful uncertainty in future labor income, the optimal behavior of moderately impatient consumers is much better described by Friedman's original statement of the permanent income hypothesis than by the later explicit maximizing versions.").

28. If there were multiple people in one session telling the same story, I counted this as one interview. If there were two people in one session telling two separate stories, I counted this as two interviews.

29. I have no reason to believe that the people for whom I was not able to find a working phone number or for whom I was not able to reach are poorer or significantly different in other ways than the respondents in the study.

30. There are seven different Regional Land Claims Commissions (RLCCs) that I could have sampled from: Eastern Cape, Gauteng/Northwest, Western Cape, Limpopo, Mpumalanga, Kwa-Zulu Natal and the Free State/Northern Cape.

31. See Interview with Blessing Mphela, Chief Land Claims Comm'r, Dep't of Rural Dev. & Land Reform, in Pretoria, S. Afr. (June 22, 2008). Given the fact that the apartheid state did not allow the majority of blacks to become owners, Gauteng's approach ensured that past imbalances and hierarchies were not resurrected through the restitution program.

32. There is a correlation between respondents under 60 and being employed.

33. The Commission does not have readily accessible information on the age of restitution beneficiaries, so I could not compare the average age of the sample with that of the true population.

34. Many of the ODIs in the sample were evicted from Simon's Town, a seaside town in the Western Cape, and are now living in a community called Luyolo located in the Cape Flats. This is because Simon's Town was a densely populated community with several families living on one plot of land; and instead of trying to establish the boundaries of each plot and who legitimately resided there, the Commission decided that every person who was 18 or older at the time of the eviction would be considered an ODI.

35. For more about the apartheid-era racial categories see generally CENSUS IN BRIEF, CENSUS 2001, STATISTICS S. AFR. (2001) 13 available at <http://www.statssa.gov.za/publications/CinBrief/CinBrief2001.pdf> (last visited July 22, 2010); BILL ASHCROFT ET AL., POST-COLONIAL STUDIES:

THE KEY CONCEPTS 14-15 (2000)("Under the [Group Areas Act], people of African, Cape Colored or Indian descent were forcibly removed from urban areas where they had lived for generations.").

36. There was a correlation between white respondents and being employed. Also, there was a negative correlation between white respondents and being a pensioner or in the 61-75 age bracket.

37. One respondent explained that a father and his sons often owned the property at the time of eviction so Indian women often did not have a right to make a claim. "Respondent: The six boys were the owners of the property, not the girls. The girls didn't get anything. Interviewer: Why was that?"

Respondent: That's just the culture thing, you know what we do is when the girls are at home, you do everything for them. When they get married you give them everything [a dowry] and you send them off and that's the end of it. That's the culture thing." See confidential interview with a former resident of Marabastad, in the Gauteng region, S. Afr. (2008).

38. Restitution of Land Rights Act 22 of 1994, as amended by Act 48 of 2003 §2 (S. Afr.).

39. See DEP'T OF LAND AFFAIRS, S. AFR., WHITE PAPER ON SOUTH AFRICAN LAND POLICY S. 2.1 (1998)(stating the government has declared that freedom and agency are indispensable elements of the restorative process.).

40. From its inception to 2008, the Commission has settled 65,642 urban claims: 73 percent financial compensation, 24 percent land restitution and 4 percent other equitable remedy. *Supra* note 8.

41. Initially, the Commission was suppose to finish its work and terminate in 2008. Interview with Blessing Mphela *supra* note 31.

42. Claimants received R 40,000 for the first 600 square meters (sqm). If the property was between 600 to 1,800 sqm, then they received the prior amount plus an additional R 40 per sqm. If the property was between 1801 to 3000sqm, then claimants received the prior amount plus an additional R 20 per sqm. If the property was between 3001sqm to two hectares, then they received the prior amount plus an additional R 10 per sqm. There is no additional compensation for properties in excess of two hectares.

43. Interview with Andile Shoko, Project Officer, Western Cape Regional Land Claims Commission, in George, S. Afr. (Aug. 4, 2008).

44. Interview with Sonya Erasmus, Project Officer, Western Cape Regional Land Claims Commission, in George, S. Afr. (Aug. 4, 2008).

45. Interview with Peter Piccolo, Senior Project Officer, Western Cape Regional Land Claims Commission, in George, S. Afr. (Aug. 4, 2008).

46. Interview with Tozi Gwanya, Director General of Land Affairs, in Pretoria, S. Afr. (Aug. 27, 2008).

47. Interview with Sincede Masiza, Senior Project Officer, Western Cape Regional Land Claims Commission, in Cape Town, S. Afr. (Aug. 12, 2008).

48. Interview with Beverly Jansen, Regional Commissioner, Western Cape Regional Land Claims Commission, in Cape Town, S. Afr. (Aug. 12, 2008).

49. Interview with Willem Nero, Deputy Director, Western Cape Regional Land Claims Commission, in Cape Town, S. Afr. (Aug. 12, 2008).

50. See Johan van Tooyen & Bongiwe Njobe-Mbuli, *Access to Land: Selecting the Beneficiaries* in AGRICULTURAL LAND REFORM IN SOUTH AFRICA: POLICIES, MARKET AND MECHANISMS 461(van Zyl eds. et al, 1996) ("Land distribution in South Africa is highly skewed. Approximately 87 per cent of agricultural land is held by almost 67,000 white farmers and accommodates a total population of 5.3 million. The remaining 71 percent of the population, which is predominantly black, live on 13 per cent of the land in high density areas—the former homelands.").

51. *Supra* note 18, at 9.

52. Interview with Ria de Vos, Director of Restitution Coordination and Support, Central Land Claims Commission, in Pretoria, S. Afr. (Mar. 4, 2008).

53. Interview with Peter Piccolo, *supra* note 45.

54. Interview with Angela Conway, Executive Director, Southern Cape Land Committee, in Goerge, S. Afr. (Aug. 6, 2008).

55. Interview with Blessing Mphela, *supra* 31.

56. Interview with Beverly Jansen, *supra* note 48.

57. *Supra* notes 23-27.

58. If the data of this study is consistent with the conclusions of prior studies, then we should find that respondents who received larger restitution awards are less likely to be in the low economic impact category. The data show that, on average, former owners received more than former tenants—R 105,650 and R 27,559 respectively (approximately \$ 15,092 and \$ 3,937)—and only 26 percent of former owners are in the low economic impact category as opposed to 47 percent of former tenants.

59. Not everyone renovated their homes. Two respondents were able to purchase a new home with their restitution award. Two sisters used the money to send a child to college. Mrs. Reed and Mrs. Andile both purchased taxis, which their sons drive to make a living. Whether a respondent improved their existing assets or acquired new assets, it is important to note the general welfare effects of all assets. See MICHAEL SHERADEN, *ASSETS AND THE POOR* 148 (1991) (arguing that assets improve economic and household stability, create an orientation toward the future, stimulate development of human and other capital, enable people to focus and specialize, provide a foundation for risk-taking, yield personal social and political dividends, and enhance the welfare of offspring.).

60. See confidential interview with a former resident of Kliptown, in the Gauteng region, S. Afr. (2008).

61. See confidential interview with a former resident of Paarl, in the Western Cape region, S. Afr. (2008).

62. See confidential interview with former resident of Steurhof, in Cape Town, S. Afr. (2008).

63. See confidential interview with former residents of Kilnerton, in the Gauteng region, S. Afr. (2008).

64. See confidential interview with a former resident of Evaton, in the Gauteng region, S. Afr. (2008).

65. See confidential interview with a former resident of Simon's Town, in the Western Cape region, S. Afr. (2008).

66. See confidential interview with a former resident of Kliptown, in the Gauteng region, S. Afr. (2008).

67. See confidential interview with a former residents of Paarl, in the Western Cape region, S. Afr. (2008).

68. *Id.*

69. *Supra* notes 23-27.

70. 75 percent of the respondents in the low economic impact category received a restitution award of R 40,000 (approximately \$ 5, 714) or less.

71. See TW BENNETT, *CUSTOMARY LAW IN SOUTH AFRICA* 61-67 (2004) (describing statutory intestate succession laws in South Africa.).

72. See confidential interview with a former resident of District Six, in Cape Town, S. Afr. (2008).

73. See confidential interview with a former resident of Green Point, in Cape Town, S. Afr. (2008).

74. See confidential interview with a former resident of District Six, in Cape Town, S. Afr. (2008).

75. See confidential interview with former residents of Kilnerton, in the Gauteng region, S. Afr. (2008).

76. See confidential interview with former residents of Paarl, in the Western Cape region, S. Afr. (2008).

77. Unfortunately, Ms. Valley's cousins had to divide her deceased aunt's share by four, which left them with about R750 each.

78. See confidential interview with a former residents of Paarl, in the Western Cape region, S. Afr. (2008).

79. See confidential interview with a former resident of Marabastad, in the Gauteng region, S. Afr. (2008).

80. *Supra* notes 23-27.

81. Most of the Indians in the sample are upper-class, male entrepreneurs who were all evicted from a community called Marabastad; their experience gives further credence to the theory that a person's class affects how he

spends the restitution award. I interviewed 15 people from Marabastad, only 5 of which received financial compensation, and not one of these five financial awards had a substantial economic impact.

82. See confidential interview with former residents of Kilnerton, in the Gauteng region, S. Afr. (2008).

83. *Id.*

84. *Id.*

85. See confidential interview with a former resident of Paarl, in the Western Cape region, S. Afr. (2008).

86. *Id.*

87. Four of twenty-nine respondents purchased tombstones in the low economic impact category and six of twenty-four purchased tombstones in the substantial economic impact category.

88. See confidential interview with former residents of Kilnerton, in the Western Cape region, S. Afr. (2008).

89. *Id.*

90. See confidential interview with a former resident of Sophiatown, in the Gauteng region, S. Afr. (2008).

91. See confidential interview with a former resident of Kliptown, in the Gauteng region, S. Afr. (2008).

92. See confidential interview with a former resident of Sophiatown, in the Gauteng region, S. Afr. (2008).

93. Of the twelve people in the sample aged seventy-six to one-hundred, only two financial awards resulted in a substantial economic impact, six had a moderate economic impact, and four had a low economic impact. The awards the Commission gave to respondents in this age group ranged from R 2,000 to R 210,000 (approximately \$ 285 to \$ 30,000).

94. See confidential interview with a former resident of Kilnerton, in the Gauteng region, S. Afr. (2008). See confidential interview with a former resident of Kliptown, in the Gauteng region, S. Afr. (2008).

95. See confidential interview with a former resident of Kliptown, in the Gauteng region, S. Afr. (2008).

96. *Id.*

97. *Id.*

98. See Interview with Linda Faleni, Regional Commissioner, Regional Land Claims Commission for Eastern Cape, in Cape Town, S. Afr. (Jun. 17, 2008).

99. Interview with Sincede Masiza, *supra* note 47.

100. See Interview with Humphrey Mashiyane, Deputy Director, Regional Land Claims Commission for Gauteng, in Pretoria, S. Afr. (Jul. 08, 2008).

101. Interview with Tozi Gwanya, *supra* note 46.

102. Anna Bohlin, *A Price on the Past: Cash as Compensation in South African Land Restitution*, 38 CANADIAN J. AFR. STUD. 672, 675 (2004) ("One reason for choosing cash instead of land that was voiced by claimants in both towns was the perception that cash claims would be processed more quickly...claimants were skeptical regarding the prospect of collectively owning land, fearing conflicts and mismanagement.").

103. Edward Lahiff, *Land Reform in South Africa: A Status Report 2008* 37 (Program for Land and Agrarian Studies Research Report No. 38, 2008) ("Inadequate support to the beneficiaries of land reform has been a recurring complaint almost since the inception of the programme. Various studies have shown that beneficiaries experience severe problems accessing services such as credit, training, extension advice, transport and plowing services, and access to input and produce markets.").

104. *Id.* ("The majority of [Communal Property Associations] are partly functional from an institutional perspective but are largely or totally dysfunctional in terms of allocation of individual resources and the defining of clear usage rights, responsibilities, powers and procedures for members and the decision making body." ).

105. *Id.*

106. See generally DEP'T OF AGRICULTURE, FOREST & FISHERIES

ANN. REP. 1 APRIL 2008—31 MARCH 2009 (2009) (S. AFR.).

107. *Id.*

108. See generally Bernadette Atuahene, *From Reparations to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1420 (2007).

109. *Id.* at 1431-32 (“Property-induced invisibility is the confiscation or destruction of real property with no payment of just compensation, executed such that dehumanization occurs. The act is perpetrated by the state or other prevailing power structure(s) and adversely affects powerless people or people made powerless by the act, such that they are effectively left economically vulnerable and dependent on the state to satisfy their basic needs.”).

110. *Id.* at 1444-45.

111. *Id.* at 1448 (“Restorative policies cannot afford to remain unduly rigid by failing to offer meaningful choices. Instead, these policies must allow people to exercise their volition by choosing the mode of restoration that best fits their idiosyncratic situation to the extent possible, and this will do a significant amount of work in restoring an invisible community or individual’s relationship to society.”).

112. See generally Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHICAGO L. REV. 1159 (2003) (describing “libertarian paternalism,” which postulates that the government can find a middle ground between libertarianism and paternalism by providing incentives to promote certain choices.).

113. Interview with Tozi Gwanya, *supra* note 46.

114. See generally, STEPHAN KOTKIN & SAJO ANDRAS, *POLITICAL CORRUPTION IN TRANSITION: A SKEPTICS HANDBOOK* (2002); AND ALI SHAUKAT, *CORRUPTION: A THIRD WORLD PERSPECTIVE* (1985).

115. *Supra* note 50.

116. See generally CHERYL WALKER, *LAND-MARKED: LAND CLAIMS AND LAND RESTITUTION IN SOUTH AFRICA* (2008) (arguing that the state should not base present policy on the master narrative of loss and restoration.).

117. Aliber, Roefs & Reitzes, *Assessing the Alignment of South Africa’s Land Reform Policy to People’s Aspirations and Expectation: A Policy-Oriented Report Based on a Survey in Three Provinces* (Human Sciences Research Council Report for the Multi-country OECD Study on Measuring Human Rights, Democracy and Governance, 2006) (noting only 45 percent of respondents wanted their land restored to them).

118. *Supra* notes 23-27.

119. See *Former Highlands Residents: Ash v. Dep’t of Land Affairs LCC* 116/98 (2000) (stating that for determining just and equitable compensation, the equitable balance required by the Constitution will in most cases be best achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require). The problem is that this comprehensive definition of just compensation is applied only when the matter ends up in court otherwise the Commission bases its offer primarily on FMV.

120. *Supra* note 8.

121. *Supra* note 2.

122. The equity enhancing factors are: “Current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation.” *Id.*

123. Since 2004, the Commission has increasingly relied on eminent domain. See Ruth Hall, *Land and Agrarian Reform in South Africa: A Status Report* 2004 20-21 (Program for Land and Agrarian Studies Research Report No. 20, 2004) (discussing the increased prevalence of expropriation by the Commission as a policy to combat inflated market prices in the willing buyer willing seller model).

124. Michael Aliber & Reuben Mokoena, *The Interaction between the Land*

*Redistribution Programme and the Land Market in South Africa: A Perspective on the Willing-Buyer/Willing-Seller Approach* 24 (Programme for Land and Agrarian Studies, Occasional Paper No. 21, 2002).

125. Interview with Tozi Gwanya, *supra* note 46.

126. See e.g., Sarah Gavian & Marcel Fafchamps, *Land Tenure and Allocative Efficiency in Niger*, 78 AM. J. AGRIC. ECON. 460, 469 (1996) (using survey data from Niger to determine that tenure insecurity causes farmers to divert scarce resources to fields where there is greater tenure security); Stein Holden & Hailu Yohannes, *Land Redistribution, Tenure Insecurity, and Intensity of Production: A Study of Farm Households in Southern Ethiopia*, 78 LAND ECON. 573, 575 (2002) (“Many authors . . . have argued that tenure insecurity discourages investment in land by removing the incentives for it, as one may not be able to collect the expected flow of benefits of one’s efforts if there looms a threat of losing the land in the future.”); Simon Johnson et al., *Property Rights and Finance*, 92 AM. ECON. REV. 1335, 1351 (2002) (finding that “[t]he most insecure firms’ investments” were 39 percent lower than the investment of “[f]irms with the most secure property rights”).

127. See Interview with Fikile Bam, Chief Land Claims Court Judge, in Johannesburg, S. Afr. (June 19, 2010).

128. See Interview with Ria de Vos, *supra* note 52.

129. See STEPHEN R. LEWIS, *THE ECONOMICS OF APARTHEID* 13, 35, 40 (1990) (noting that racial discrimination deprived a majority of the South African population of avenues to economic development (such as land ownership) and led to income disparities between whites, Asians, coloureds and blacks during apartheid.).

130. *Id.*

131. *Id.*

132. Restitution of Land Rights Act 22 of 1994, as amended by Act 48 of 2003 §1 (S. Afr.).

133. *Supra* note 52.

134. Minister G. Nkwinti, Speech at the National Assembly, Parliament (Mar. 24, 2010)

135. The role of choice is particularly important in rural community claims. These claims often involve a large number of beneficiaries. If the majority chooses land restitution, then the Commission ignores the preferences of community members who would rather choose financial compensation. Unfortunately, all too often only the few community members who are farming or grazing their animals on the land benefit directly. The large number of beneficiaries makes governing and making a profit difficult. See LUNGISILE NTSEBEZA & RUTH HALL, *THE LAND QUESTION IN SOUTH AFRICA: THE CHALLENGE OF TRANSFORMATION AND REDISTRIBUTION*, 179 (2007) (describing how Communal Property Associations forced a large number of beneficiaries to participate in complex group processes rather than treating them as individuals). To promote a manageable number of beneficiaries the Commission should abandon majority rule and allow each family to choose between an array of options. Less beneficiaries could increase efficiency because each remaining family unit could have defined, long-term use rights over a particular piece of the land.

136. *Supra* notes 23-27.

